No. 87-267-ASX
Status: GRANTED

Docketed:
August 14, 1987

Title: D. H. Holmes Company, Ltd., Appellant
v.
Shirley McNamara, Secretary of Revenue and Taxation of Louisiana

Court: Court of Appeal of Louisiana, Fourth Circuit

Counsel for appellant: Rinker Jr.,Andrew

Counsel for appellee: Pugh,Robert G.

NOTE* Notice of appeal filed 8/4/87

Entry	Date	Note	Proceedings and Orders
1	Aug 14 1987	G	Statement as to jurisdiction filed.
3	Aug 28 1987		Order extending time to file response to jurisdictional statement until October 14, 1987.
4	Oct 13 1987		Motion of appellees to dismiss or affirm filed.
5	Oct 14 1987		DISTRIBUTED. October 30, 1987
6	Oct 14 1987		REDISTRIBUTED. October 30, 1987
7	Nov 2 1987		PROBABLE JURISDICTION NOTED.
			**********
9	Nov 16 1987		Order extending time to file brief of appellant on the merits until December 24, 1987.
10	Dec 23 1987		Joint appendix filed.
11	Dec 23 1987		Brief of appellant D. H. Holmes Co., Ltd. filed.
12	Dec 23 1987		Brief amicus curiae of Committe on State Taxation filed.
13	Dec 23 1987		Brief amicus curiae of Direct Marketing Assn. filed.
14	Dec 23 1987		Brief amicus curiae of American Retail Federation filed.
15	Dec 24 1987		Brief amicus curiae of R.R. Donnelly & Sons Co., et al. filed.
16	Dec 24 1987		Brief amicus curiae of National Association of Catalog Showroom Merchandisers filed.
18	Jan 4 1988		Order extending time to file brief of appellee on the merits until February 8, 1988.
21	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 22, 1988. (3rd case).
20	Feb 6 1988		Brief of appellee Shirley McNamara filed.
19	Feb 8 1988		Brief amicus curiae of Multistate Tax Commission filed.
22	Feb 8 1988		Brief amici curiae of National Governors' Association, et al. filed.
23	Feb 10 1988		CIRCULATED.
24	Mar 2 1988	X	Reply brief of appellant D. H. Holmes Co., Ltd. filed.
25	Mar 22 1988		ARGUED.

87-267

No. _____

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

D.H. HOLMES CO., LTD.,

Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether provisions of the Louisiana use tax law, La. Rev. Stat. §§ 47:302(A)(2), 47:305(E) and 47:321(A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, free of charge to the recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were appellant, D.H. Holmes Co., Ltd., and appellee, Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana. The same parties are before this Court.

Appellant, D.H. Holmes Co., Ltd., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

D.H. HOLMES CO., LTD.,

Appellant

v.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

D.H. Holmes Co., Ltd., the appellant, appeals from the final judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, dated March 16, 1987, application for writ of certiorari denied by the Louisiana Supreme Court on May 29, 1987, holding that La. Rev. Stat. §§ 47:321(A)(2), 47:321(A), and 47:305(E), as applied in this case, are not unconstitutional as being violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

OPINIONS BELOW

The judgment and opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, is reported at 505 So.2d 102 and appears at Appendix 2A-10A, *infra*, and the denial of appellant's application to the Louisiana Supreme Court for writ of certiorari, is reported at 506 So.2d 1224 and appears at Appendix 11A. The judgment and opinion of the trial court, the Civil District Court for the Parish of Orleans, State of Louisiana, is unreported and appears at Appendix 12A-22A.

JURISDICTION

The judgment of the Louisiana Court of Appeal, assessing a use tax against appellant on merchandise catalogs shipped in interstate commerce directly to Louisiana residents from out-of-state printers, was entered on March 16, 1987. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 4th Cir. 1987); Appendix 2A. Appellant's application for writ of certiorari to the Supreme Court of Louisiana, timely filed on April 14, 1987,[1] was denied on May 29, 1987. 506 So.2d 1224; Appendix 11A.

Appellant filed its Notice of Appeal to this Court (Appendix 23A-24A) with both the Supreme Court of Louisiana and The Louisiana Court of Appeal, Fourth Circuit, on June 29, 1987. Appendix 23A[2]. This appeal is being docketed in this Court within ninety (90) days from the denial of appellant's application for writ of certiorari by the Louisiana Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

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1. La. Supreme Court Rule X, Section 4, Subsection (b) provides, in pertinent part: "The application [for a writ of certiorari] shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal. . ."

2. Appellant filed a Supplemental Notice of Appeal on August 4, 1987, to assure that its Certificate of Service complied with all requirements of U.S. Supreme Court Rule 28.5.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have the power
>
> * * *
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

La. Rev. Stat. § 47:302(A)(2):

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

La. Rev. Stat. §47:321(A) provided:

> A. In addition to the tax levied by R.S. 47:302 (A) and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and

the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2 . . . the levy of said tax to be as follows:

* * *

(2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

La. Rev. Stat. § 47:305(E)[3] *provides:*

E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bonafide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible property after it has come to rest in this state and has become a part of the mass of property in this state.

* * *

3. Paragraph 5 of La. Rev. Stat. § 47:305 was redesignated as Paragraph E in 1986.

HOW THE FEDERAL QUESTION WAS RAISED

Holmes raised its constitutional objections at the earliest stage of the proceedings below. In its Answer to the lawsuit filed by the State of Louisiana to collect the allegedly owed "use taxes," Holmes pleaded that the application of the Louisiana use tax statutes, assessing a tax on catalogs mailed in interstate commerce, violated the Commerce Clause. Subsequently, Holmes filed a summary judgment motion again urging the unconstitutionality of the tax statutes as applied against it. The trial court denied Holmes' motion. Holmes thereafter challenged the constitutionality of the assessment in its pre-trial memorandum, at trial and in its post-trial memorandum. The trial court Judgment expressly considered and rejected Holmes' constitutional challenge to the Louisiana tax statutes. *See* Appendix 12A at 13A, 21A-22A.

Holmes reiterated its constitutional challenge before the Louisiana Court of Appeal, Fourth Circuit. The Court of Appeal, like the trial court, upheld the statute as constitutional. *See* Court of Appeal decision, 505 So.2d 102, 105-106, Appendix 2A at 8A-9A. Thus, the Court of Appeal, like the trial court, expressly considered appellant's constitutional challenge to the application of the Louisiana use tax statutes, ruling in favor of the state statutes.

Holmes then timely filed an application for a writ of certiorari with the Supreme Court of Louisiana, again asserting that the Louisiana use tax statutes, as applied to assess a tax on its catalogs in interstate commerce, violated the Commerce Clause. On May 29, 1987, the Supreme Court of Louisiana, by a four-to-three vote, refused to hear the case, denying appellant's writ application. *See* 506 So.2d 1224, Appendix 11A. Holmes then timely filed its Notice of Appeal to this Court on June 29, 1987.

STATEMENT OF THE CASE

D.H. Holmes Company, Ltd., is a Louisiana corporation with its principal place of business and registered office in New Orleans, Louisiana. Holmes has department stores in various locations within Louisiana, as well as in other states.

During the calendar years 1979, 1980 and 1981, Holmes contracted with New York professionals to design merchandise catalogs to promote Holmes' merchandise and name and generate sales. Once prepared, the catalogs were printed in Oklahoma City, Boston, or Atlanta, and then delivered to the respective local offices of the United States Postal Service, postage prepaid, for direct mailing to select residents of Louisiana, Mississippi, and Alabama. Most of the catalogs (82%) were mailed to Louisiana residents directly from either Oklahoma City, Boston, or Atlanta.

The catalogs were delivered by the United States Postal Service from the Oklahoma City, Boston, or Atlanta post offices where they were mailed directly to the mailboxes of the Louisiana addressees. At no time did Holmes or any of its agents or employees receive or take possession of the catalogs mailed from Oklahoma City, Boston, or Atlanta.

Holmes absorbed the entire cost of these catalogs, including the cost of mailing. The recipients received the catalogs free of charge. Holmes ordered merchandise catalogs in 1979 at a cost of $520,000, in 1980 for $670,000 and in 1981 for $834,000.

The Louisiana Department of Revenue and Taxation (hereafter "State") audited Holmes' sales/use tax returns for the calendar years 1979, 1980 and 1981. The State assessed Holmes for delinquent use taxes on the value of the catalogs mailed directly from outside Louisiana to Louisiana residents. Holmes protested the State's assessment as to these catalogs, and the State filed suit.

Holmes answered the suit, expressly alleging that the application of the Louisiana use tax statute in imposing a tax on the catalogs mailed from out of state to Louisiana residents violated the Commerce Clause of the United States Constitution. Holmes subsequently filed a motion for summary judgment challenging application of the statute on this constitutional ground. The trial court denied Holmes summay judgment motion on March 21, 1984. Holmes repeatedly challenged the constitutionality of the use tax statutes during the proceedings in trial court. In its pre-trial memorandum, during trial, and in its post-trial memorandum, Holmes continually asserted the unconstitutionality of the state use tax statutes as applied to assess a tax on the catalogs mailed free of charge to Louisiana addressees from out of state. Nevertheless, the trial court rendered judgment in favor of the State. In ruling for the State, the trial court expressly considered and rejected Holmes' constitutional challenge to the application of the use tax statutes. *See* decision of the trial court, Appendix 12A at 13A, 21A-22A.

Holmes appealed the decision to the Louisiana Court of Appeal, Fourth Circuit, urging, *inter alia*, that the trial court erred in sustaining the validity of the application of use tax statutes against Holmes' constitutional challenge. The Fourth Circuit decision, rendered on March 16, 1987, affirmed the trial court's ruling, expressly considering and sustaining the validity of the state use tax statutes, and the assessments thereunder, and rejecting Holmes' Commerce Clause challenge. *McNamara v. D.H. Holmes*, 505 So.2d 102, 105-106 (La. App. 4th Cir. 1987); Appendix 2A at 8A-9A. The court analyzed the application of the tax statutes in light of *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), finding that the application of the tax did not violate

the Commerce Clause. *McNamara*, 505 So.2d at 105-106, Appendix at 8A-9A. Thus, the Court of Appeal found that the tax was not within the exemption provided by La. Rev. Stat. § 47:305(E)[4] "on bona fide interstate commerce." *Id*.

Having no further right of appeal under Louisiana law, Holmes filed an application for writ of certiorari with the Supreme Court of Louisiana urging, *inter alia*, the unconstitutionality of the use tax statutes as applied. On May 29, 1987, The Supreme Court of Louisiana, by a 4-3 vote, refused to exercise its discretionary jurisdiction, denying Holmes' application for a writ of certiorari. 506 So.2d 1224, Appendix 11A. Holmes then timely filed its notice of appeal to this Court. Appendix 23A-25A.

THE QUESTION IS SUBSTANTIAL

This case presents the question, never before addressed by this Court, whether a state, consistent with the Commerce Clause, may apply its use tax statutes to assess a tax against a merchant on catalogs mailed in interstate commerce to its customers free of charge. While this Court has decided a number of Commerce Clause tax cases dealing with ***activities*** relating to commerce, and to ***goods*** sold for profit and shipped in interstate commerce, before and after they left the stream of commerce, no case decided by this Court addresses the issues presented by this case, or the relationship between these recent cases and this Court's long-established rule that ***goods*** in interstate commerce are not subject to taxation. Here, Louisiana's application of its use tax statute directly presents these issues. Holmes submits that the Louisiana use tax statutes, as applied in this case, violate the Commerce Clause.

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4. See note *3, supra*.

The very heart of the Commerce Clause is the protection of *goods* in transit from state to state from taxation by state or local government. This Court most recently summarized this long-standing precept in *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 72-73, 67 S.Ct. 1062, 91 L.Ed. 1346, 1353 (1947):

> The governing principles were stated in *Minnesota v. Blasius*, 290 U.S. 1, 9, 10, 54 S.Ct. 34, 78 L.Ed. 131, as follows:
>
> > ". . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the State to impose a nondiscriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101, 49 S.Ct. 292, 73 L.Ed. 626.

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be part of the general mass

of property within the State and is thus subject to its taxing power."

More recently, this Court has recognized the continued sanctity of goods in transit in interstate commerce from taxation by the states. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), (Export Clause case - the Court, in finding the goods in question taxable by the county, found that the goods had come to rest and were no longer in transit); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344, 74 S.Ct. 535, 98 L.Ed. 744 (1954), (in *dicta*, the Court noted that a state could not impose a use tax on goods in transit in interstate commerce consistent with the Commerce Clause).

The state courts have also recognized the limitations imposed by the Commerce Clause in taxing goods sent in interstate commerce. *See, e.g., Service Merchandise Co., Inc. v. Tidwell*, 529 S.W.2d 215 (Tenn. 1975), (Tennessee Supreme Court held that the Commerce Clause prohibited imposition of use tax on a Tennessee merchant with regard to advertisement materials, including catalogs, promoting goods of the Tennessee merchant, which were shipped via private truck carrier and the U.S. Mail, from an out-of-state printer to Tennessee residents); *District of Columbia v. W. Bell & Co., Inc.*, 420 A.2d 1208, 1210-11 and n.3 (D.C. App. 1980) (while not reaching the constitutional issue, the court noted the trial court's finding that imposition of use tax on catalogs mailed to a Washington merchant's "in state" customers from a printer outside the District of Columbia was in violation of the Commerce Clause; the court noted the distinction between taxing ***goods*** while in the stream of commerce and taxing local business ***activity*** involving interstate commerce).

Louisiana's application of its use tax statutes in the present case directly violates the Commerce Clause prohibition against the taxation of goods while in the stream of interstate commerce. Here, the catalogs were designed and printed outside Louisiana; they were mailed in interstate commerce from the three out-of-state printers directly to the mailboxes of Louisiana recipients. There was no interruption in the journey of the catalogs from the out-of-state printers to the Louisiana recipients which arguably could provide the basis for the Louisiana assessment. The catalogs were printed, addressed, and mailed outside Louisiana. Holmes had no control over the catalogs once they were placed in the U.S. Mail outside the State of Louisiana; the catalogs were then in interstate commerce and remained in interstate commerce until they were retrieved from the mailboxes of the Louisiana addressees. At this point, Holmes had no control or ownership over the catalogs; they then belonged to the Louisiana addressees. There was no Louisiana point at which the catalogs belonged to Holmes providing the basis for a constitutional assessment of the use tax on the catalogs against Holmes. As the catalogs were mailed free of charge to the Louisiana recipients, there was no sale of goods by Holmes, inside or outside of Louisiana, upon which Louisiana could constitutionally base assessment of a use tax.

In upholding the tax statutes against Holmes' Commerce Clause attack, the Louisiana courts relied upon *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1971), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). The Louisiana Court of Appeal found that *Washington Stevedoring* established a four-part test to determine whether a statute violated the Commerce Clause:

> A tax statute can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state.

McNamara v. D.H. Holmes, 505 So.2d 102, 105 (La. App. 4th Cir. 1987); Appendix at 8A. The Louisiana court then continued, finding that application of the use tax statutes to impose the tax against the catalogs met this test. *Id.*, 505 So.2d at 106; Appendix at 9A. The Court of Appeal found the first part satisfied because of Holmes' Louisiana stores and customers. *Id.* The court held that imposition of the tax met the second and third parts of the test, because the tax applied equally to catalogs printed inside and outside of Louisiana. *Id.* It held the fourth part satisfied because, the State of Louisiana provides many benefits to Holmes. *Id.*

A substantial question is presented, because the Louisiana Court of Appeal's reliance on *Complete Auto Transit* and *Washington Stevedoring* is misplaced. While those cases plainly addressed the constitutionality of state or local taxation on *activities* of taxpayers within a taxing jurisdiction, they do not clearly address the taxation of *goods* in interstate commerce, particularly goods sent without charge to the recipient. *Complete Auto* and *Washington Stevedoring* involved taxes on *local activities*. In both *Complete Auto Transit* and *Washington Stevedoring*, relied upon by the Louisiana court, the tax imposed was in the nature of an occupational tax assessed on the taxpayer's business *activities* in the taxing jurisdiction. In this case, the use tax is being imposed on *goods* mailed in interstate commerce, *i.e.*, the free catalogs mailed postage pre-paid from outside Louisiana to Louisiana addressees. As the catalogs were designed, printed and mailed free from out of state, Holmes engaged in no

Louisiana use, sale or activity providing a constitutional basis for the tax assessment. A substantial question is presented concerning the applicability of *Complete Auto Transit* and *Washington Stevedoring* to this case.

Second, neither *Complete Auto Transit* nor *Washington Stevedoring*, nor any other case decided by this Court, expressly or impliedly overrules this Court's long-standing jurisprudence prohibiting taxation of *goods* in the stream of interstate commerce. As appellant argued below, and as the District of Columbia Court of Appeals found in *District of Columbia v. W. Bell & Co., Inc., supra*, ". . . tax[ation] of *goods* while they are *in* the stream of interstate commerce must be distinguished from a state tax on *business activity* involving interstate commerce." *Id.*, 420 A.2d at 1211 n.3 (emphasis added).

Third, the holding of the Louisiana Court of Appeal on the constitutional issue presented is directly contrary to the rulings of other courts which have considered the issue on virtually identical fact situations. In *Service Merchandise Co., Inc. v. Tidwell, supra*, the Tennessee Supreme Court held unconstitutional an application of the Tennessee use tax statutes seeking to tax catalogs sent in interstate commerce. There, Service Merchandise, a Tennessee merchant, had catalogs printed and addressed for mailing by a Minnesota firm. Afterwards, the catalogs were trucked directly from the printer in Minnesota to a regional post office in Tennessee where they were mailed to addresses both in and out of Tennessee. The Tennessee Supreme Court expressly held that Tennessee's imposition of the use tax on the catalogs as assessed against Service Merchandise, violated the Commerce Clause. *Id.* 529 S.W.2d 218-20. Similarly, in *W. Bell & Co., supra*, the District of Columbia Court of Appeals, in *dicta*, noted the unconstitutionality of the District's assessment of a tax on catalogs mailed in interstate commerce to District of Columbia recipients.

Finally, the ruling of the Louisiana Court of Appeal, upholding the Louisiana's extension of its use tax to impose a tax on catalogs mailed in the stream of commerce from other states, will have a serious detrimental impact on the free flow of goods in interstate commerce. Like Louisiana, most other states have use tax statutes. The continual decrease of federal aid, combined with the increasing need for new state revenues make this case immensely important to states and localities, to wholesale and retail merchants, and to consumers. The immediate impact of the decisions below is to render every free catalog or other advertisement flyer mailed in interstate commerce to a Louisiana addressee subject to the Louisiana use tax, with increased costs to merchants, and ultimately to consumers. The ultimate impact of this Louisiana decision is to extend this onerous Louisiana concept of interstate commerce taxation to all fifty states. In addition to the obvious monetary burden on the free flow of interstate commerce, such taxes will result in a nightmarish administrative burden on merchants mailing catalogs and other advertisement materials to addressees in multiple jurisdictions.

The application of the Louisiana use tax statutes in this case is contrary to this Court's long-established jurisprudence regarding taxation of goods in interstate commerce. The ruling of the Louisiana Court of Appeal on this important constitutional issue is directly contrary to the rulings of other state courts addresssing the identical issue under almost identical circumstances. The burden that the tax imposes on interstate commerce is substantial. This case presents a substantial and important constitutional question which should be fully briefed, orally argued, and addressed by a formal decision of this Court.

CONCLUSION

For the reasons discussed above, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

Judgment and Opinion, Court of Appeal, Fourth Circuit, State of Louisiana 2A

Writ Denial, The Supreme Court of the State of Louisiana 11A

Judgment and Reasons for Judgment, Civil District Court, Parish of Orleans, State of Louisiana 12A

Notice of Appeal to the Supreme Court of the United States 23A

Supplemental Notice of Appeal to the Supreme Court of the United States 27A

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. CA-6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VERSUS

D. H. HOLMES COMPANY, LTD.

AN APPEAL FROM THE
CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 83-15523
HONORABLE REVIUS ORTIQUE, JR.
JUDGE

DENIS A. BARRY
JUDGE

(Court composed of JJ James C. Gulotta, Denis A. Barry, and Charles R. Ward)

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MAR 16 1987

AFFIRMED

D. H. Holmes Company, Ltd. appeals a judgment in favor of the Louisiana Department of Revenue and Taxation for delinquent use taxes on its direct mail catalogs. It claims the State has violated the federal Commerce Clause.

Holmes, a Louisiana corporation with its principal place of business and registered office in New Orleans, has department stores in various locations within the state. In 1979-1981 Holmes contracted with New York companies to design merchandise catalogs which were printed in Oklahoma City, Boston or Atlanta and mailed from those cities to selected residents in Louisiana (about 82% of the catalogs), Mississippi and Alabama. About 1,000 catalogs are distributed from their Canal Street store.

Holmes paid for the catalogs' design, paper, printing and mailing which customers received without charge. The cost of four catalogs in 1979 was $520,000, six in 1980 cost $670,000, and nine in 1981 cost $834,000. Holmes did not pay sales taxes where the catalogs were printed or designed.

Holmes utilized the catalogs to advertise merchandise, to encourage sales, and for name recognition. The catalogs contained instructions to the postal carrier to leave them with the current resident if the addressee had moved. The return address was the Canal Street store.

The Louisiana Department of Revenue and Taxation conducted an audit of Holmes' tax returns for 1979-1981 and assessed the store for delinquent sales taxes on candy and use taxes (plus interest) on the value of the catalogs. Holmes protested and the State filed suit. Holmes answered that no use tax was due, that R.S. 47:305 authorizing taxation of loose candy was invalid, and that such taxes were violative of the Commerce Clause. Holmes' motion for summary judgment was denied, the case went to a bench trial, and a directed verdict on the catalog issue was denied. Both sides stipulated the amount allegedly due in use taxes on the catalogs and in sales tax on the candy (if the regulation was found valid or invalid).

The trial court concluded there was no constitutional violation; La. R.S. 47:305(5) as it affected the distribution of Holmes' catalogs was valid; and awarded the delinquent use taxes (stipulated at trial) plus statutory interest and attorney's fees. The court found the regulation at issue as to the candy sales invalid and rendered judgment accordingly. After judgment the court granted a new trial on the candy issue. The joint motion of the State and Holmes to dismiss without prejudice the candy sales tax issue (which had been compromised) was also granted. The court later restated the judgment to deny Holmes' motion for a new trial on the catalog issue and to render the same judgment on that issue.[1]

---

1. We note that the restated judgment incorrectly used the paragraph (from the first judgment) relating to the amount due on the candy issue, $49,710.

APPLICATION OF USE TAX

La. R. S. 47:302 provides in pertinent part:

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of tax.

La. R.S. 47:321 (pre-1983 amendment) similarly provides in pertinent part:

> A. In addition to the tax levied by R.S. 47:302 (A) and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2, except upon drugs, orthotic and prosthetic devices and patient aids prescribed by physicians, for personal consumption or use, and except upon food which is exempt under the provisions of Subsection 3 of Section 305 of this Chapter; the levy of said tax to be as follows:

* * *

> (2) At the rate of one per centum of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

The statutory intent of the Louisiana use tax law is expressed in La. R.S. 47:305(5) which declares:

> (5) It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has become a part of the mass of property in this state.

The thrust of the use tax is that purchasers or users pay taxes on all tangible personal property bought or used within the taxing authority's jurisdiction. *Concordia Parish School Board v. Russ*, 491 So.2d 1368 (La. App. 3rd Cir. 1986), writ denied 496 So.2d 350 (La. 1986). Tangible personal property includes that which can be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. La. R.S. 47:301(16). It is the same as movable property as used in property law. *Exxon Corporation v. Traigle*, 353 So.2d 314 (La. App. 1st Cir. 1977), writ denied 354 So.2d 1385 (La. 1978).

La. R.S. 47:302A(2) requires the levy of a tax upon each article of tangible personal property which is not sold, but brought into Louisiana for use. *Potashnick Construction, Inc. v. Louisiana Department of Revenue and Taxation*, 470 So.2d 526 (La. App. 1st Cir. 1985); *Sabine Pipe & Supply Company v. McNamara*, 411 So.2d 1167 (La. App. 1st Cir. 1982), writ denied 414 So.2d 1254 (La. 1982). Use includes the exercise of any right or power over tangible personal property incident to ownership thereof. The use tax includes use, consumption, distribution and storage. La. R.S. 47:301(18) and (19).

The use tax is levied on all tangible personal property imported from other states for use, consumption, distribution or storage in Louisiana just as if the articles have been sold at retail. La. R.S. 47:303(A). The taxable moment occurs "when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state." *Mouton v. Klatex, Inc.*, 238 So.2d 1,3 (La. App. 1st Cir. 1970), writ refused 256 La. 873, 239 So.2d 365 (La. 1970), appeal dismissed 401 U.S. 968, 91 S.Ct. 1192, 28 L.Ed.2d 318 (1971). See also *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d (1963) (Clark, J., joined by Black, J., dissenting). The use tax is to be computed on the retail price the property would have brought when imported. *Fontenot v. S. E. W. Oil Corporation*, 232 La. 1011, 95 So.2d 638 (1957).

Holmes purchased the catalogs out of state and paid for their mailing to addresses within Louisiana in order to further its sales. About 1,000 catalogs were distributed from its Canal Street store in New Orleans. 82% of the catalogs went to Louisiana residents who could purchase merchandise from stores within the state. After the catalogs were in Louisiana mailboxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes "use" by Holmes under the statute and is subject to the tax.

COMMERCE CLAUSE

Holmes argues the use tax on catalogs mailed by out-of-state printers violates U.S. Const. Art. I, § 8, Cl. 3, the Commerce Clause.

In some instances a state may impose a tax on interstate commerce to collect its fair share of the cost of local government. *Sales Tax District No. 1 of LaFourche Parish v. Express Boat Company, Inc.*, 486 So.2d 947 (La. App. 1st Cir. 1986), affrm'd as amended 500 So.2d 364 (La. 1987). A state may constitutionally levy non-discriminatory, properly apportioned taxes even upon a foreign corporation when it is related to the corporation's local activities and the state is providing benefits and protection for the activity. *Mobile Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980); *McNamara v. Electrode Corporation*, 418 So.2d 652 (La. App. 1st Cir. 1982), writ denied 420 So.2d 986 (La. 1982).

A state sales or use tax is not per se invalid because it burdens interstate commerce since interstate commerce may be made to pay its just share of the state tax burden. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Our statute declares it is not "the intention of this Chapter to levy a tax on bona fide interstate commerce." La. R.S. 47:305(5).

A tax statute can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *Complete Auto Transit, Inc. v. Brady, supra; Bunge Corporation v. Secretary of Department of Revenue and Taxation*, 419 So.2d 1288 (La. App. 5th Cir. 1982), writ denied 423 So.2d 1181 (La. 1982).

The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the total number of catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street store.

In order to find that the tax is fairly apportioned and lacks discrimination against interstate commerce requires a comparison to see if in-state and out-of-state taxpayers similarly situated are treated equally. *Modern Homes & Equipment, Inc. v. Collector of Revenue*, 422 So.2d 1237 (La. App. 1st Cir. 1982), writ denied 429 So.2d 128 (La. 1983). La. R.S. 47:305 has been applied to Holmes catalogs printed outside the state just as it is levied upon catalogs of other stores printed within the state. All of the catalogs are utilized to create sales in Louisiana to benefit Holmes and its employees. This tax does not create dissimilar treatment.

Louisiana provides many essential benefits and services for stores such as Holmes which should share the burden of local government. State Representative Claude Leach testified regarding the use of state funds for local government services that would directly benefit Holmes and its employees. The store does not pay taxes where the catalogs are printed so there is no multiplicity of taxes.

We agree that these facts meet the four-pronged test and there is no violation of the Commerce Clause. The record supports the assessment of use taxes on the Holmes catalogs.

We note that the restated judgment erroneously uses the figure awarded in the first judgment as to the candy issue, $49,710.00 (stipulated to at trial), which had been dismissed after a new trial was granted. We therefore amend the restated judgment to reflect the amount due in delinquent use taxes on the catalogs as declared in the first judgment and stipulated to at trial.

DECREE

The judgment is amended:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D.H. HOLMES COMPANY, LTD., in the sum of Forty Three Thousand Nine Hundred and Thirty-Seven and 03/100 ($43,937.03), with statutory *interest* as provided for in La. R.S. 47:1601 and *attorney's fees* as provided in La. R.S. 47:1512.

AMENDED

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VS.

D. H. HOLMES COMPANY, LTD.

IN RE: D. H. Holmes Co. Ltd.;
Applying for Writ of Certiorari and/or Review;
to the Court of Appeal, Fourth Circuit, Number CA-6325;
Parish of Orleans Civil District Court Div. "H" Number 83-15523

May 29, 1987

Denied.

JLD
PFC
JCW
LFC

DIXON, C.J., MARCUS & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
May 29, 1987

s/s Frans J. Labranche, Jr.
Clerk of Court
For the Court

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 83-15523

DIVISION: "H"

DOCKET: 4

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

JUDGMENT

This cause was heard on March 19, and 20, 1985. At the close of the trial on the merits, the Court invited Counsel to submit "Post Trial Memoranda", regarding the constitutionality of "use tax" levied by the State of Louisiana on catalogs mailed to potential customers from outside the state to their residences in Louisiana. As always, the Court invited other comments by Counsel, should they deem it appropriate, but all submissions to be tendered not later than April 20, 1985. The Court regrets the delay in rendering this judgment, but wishes to assure the parties and their Counsel that the delay was unavoidable. The Court wishes to commend Counsel for submitting "in depth" and "well reasoned" Memoranda.

ROBERT G. PUGH, Esq.
- Counsel for the Petitioner,
HON. SHIRLEY McNAMARA,
Secretary,
THE DEPT. OF REVENUE AND
TAXATION, STATE OF LA.

Present:

ANDREW RINKER, JR., Esq.
WILLIAM F. GRACE, JR., Esq.
- Counsel for the Respondent,
D.H. HOLMES, CO., LTD.

CONSIDERING the pleadings filed herein, the evidence, the statutory law and the jurisprudence, together with the well written Memoranda submitted by Counsel;

The Court finds that there is no violation of the United States Constitution, more particularly the commerce clause thereof;

This Court finds that Article 47:305 of the Department's Regulations, pursuant to La. R.S. 47:1511, as it relates to the sale of candy at the D.H. Holmes Company, Ltd.-Candy Counter, is invalid and unenforceable;

FINALLY, this Court finds that the "use tax" imposed by the State of Louisiana under La. R.S. 47:305(5), as it affects the distribution of catalogs by D.H. Holmes Company, Ltd. is valid and enforceable.

The Court recognizes the "Stipulations" entered into by the parties, as follows:

1. As to the candy, the parties stipulated at trial that if the regulation at issue was declared valid the sales tax on the candy would be $35,216.40 (together with statutory interest and attorney fees on the aggregate thereof) or $49,710.00 (together with statutory interest and attorney fees on the aggregate thereof) if the regulation was declared invalid.

2. The parties also stipulated at trial that the use tax on the catalogs would be $43,937.03 (together with statutory interest and attorney fees on the aggregate thereof). This figure has been adjusted for the prescribed claim mentioned above.

ACCORDINGLY, for the reasons found by the Court in the accompanying "Reasons for Judgment", attached hereto and made a part hereof;

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D.H. HOLMES COMPANY, LTD., awarding to the said Petitioner, the sum of Forty Nine Thousand Seven Hundred and Ten and no/100, ($49,710.00), Dollars, together with statutory "*interest*" provided for in La. R.S. 47:1601 and "*attorney's fees*" provided in La. R.S. 47:1512;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and

against the Respondent, D.H. HOLMES COMPANY, LTD., and awarding to the said Petitioner, the sum of Forty Three Thousand Nine Hundred and Thirty-Seven and 03/100, ($43,937.03), together with statutory "*interest*" provided for in La. R.S. 47:1601 and "*attorney's fees*" provided in La. R.S. 47:1512;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Respondent, D.H. HOLMES COMPANY, LTD., and against the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, declaring that the bulk sales of candy at the said Respondent's candy counter falls within the exemptions of La. R.S. 305(4)(a)(xiv), and that any La. Dept. of Revenue Rules and/or Regulations to the contrary, are invalid and unenforceable;

EACH PARTY to bear their respective costs;

This 19th day of July 1985.
NEW ORLEANS, LOUISIANA

s/s Revius O. Ortique
J U D G E

A TRUE COPY

s/s E. White
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 83-15523

DIVISION: "H"

DOCKET: 4

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

REASONS FOR JUDGMENT

This action is brought by the Secretary of the Department of Revenue and Taxation against D.H. Holmes Company, Ltd. for failure to pay "use" and "sales" taxes during the calendar years 1979, 1980 and 1981. Following the audit, and in keeping with Revenue Department Rules and Regulations, the company was notified of the proposed assessments, with interest. D.H. Holmes Company, Ltd. refused to pay the alleged delinquent taxes and interest due thereon, and upon its refusal, this action was brought by the Secretary of the La. Department of Revenue and Taxation.

Petitioner claims that there are taxes due by D.H. Holmes Company, Ltd. as a result of Respondent selling candy at its

candy counter (sales tax), in New Orleans, as well as Respondent's distribution of catalogs (use tax) by mail to prospective customers, in Louisiana. During the trial, the parties stipulated that certain alleged taxes had prescribed and adjustment as to the amount due was appropriate and further stipulated as to the amount that would be due, depending upon who prevailed. These stipulations were made a part of the record.

This Court is impressed with the attack made by Counsel for Respondent on the applicability of La. R.S. 47:302A with respect to the sale of candy at the Holmes candy counters. This Court finds that it was the clear intention of the Louisiana Legislature to exempt the candy sold by D.H. Holmes. Prior to 1974, there were certain very specific exemptions. But it is clear that in 1974 our legislature amended the General Sales Tax Law to *increase* the number of exemptions and to state with greater specificity those food items which were exempt and those which were not. Subsequent legislation has followed and it continues to be clear that the candy sold at D.H. Holmes Candy Counter remain exempt.

Act 186 of 1974

Act 183 of 1984

La. R.S. 47:302A

La. R.S. 47:305

There is nothing in the language of La. R.S. 47:305(4)(a)(xiv) or La. R.S. 47:305(4)(c) which would indicate to this Court an intention on the part of our legislature not to include candy sales in the exemption. Obviously, La. R.S. 47:511 gives the Secretary of the Department the authority

to promulgate "reasonable rules and regulations" for the proper administration and enforcement of the provisions of law relative to the collection of revenues. However, the Department must be certain that the regulation is not so vague and indefinite as to cause it to be "unconstitutionally vague". The Court has studied carefully the evidence and argument of Counsel on this point and there are several aspects of the regulations which are so vague that the regulations are illegal and unenforceable. In this Court's view, the most obvious one is the Regulation which attempts to proscribe that a sale of candy is taxable or non-taxable depending upon the quantity of the sale. When one examines that regulation in the light of quantities sold on a daily basis, the result is almost ludicrous. This is especially true since there is no definition of what is "large" or "small" quantities. Suffice it to state that this Court has no difficulty in finding the regulation invalid, under the "void for vagueness doctrine" of the Fourteenth Amendment of the U.S. Constitution.

Grayned vs City of Rockford
408 U.S. 104 (1972)

See also the rationale of:

State vs. Baker (La. Sup. Ct.)
359 So.2d 110(1978)

Franklin vs First Money, Inc.
427 Fed. Supp. 66 (E.D. La.) (1976)

But even more importantly this Court is convinced that the Collector of Revenue is attempting to promulgate a regulation which broadens the applicability of a tax statute. Fundamental to our law of taxation is the principle that "tax laws are to be liberally interpreted in favor of the taxpayer and strictly construed against taxing authority, and any

doubt or ambiguity is to be resolved in favor of the taxpayer". The collector in an effort to circumvent the clear declaration of the statute has resorted to all manner of mental gymnastics to extend the reach of his authority. The creation of a standard which shifts the tax burden based on: a - whether the candy is or is not consumed on the premises; or b - whether it is sold in large or small quantities; or c - whether it is sold for preparation and consumption in the home or d - even whether a place where candy is sold is a "candy or nut counter" gives the taxing authority powers not delegated by our Legislature, and is therefore invalid!

McNamara vs Patterson Services, Inc.
382 So.2d 971 (1980)

Collector of Revenue vs Mossler Acceptance Corp.
139 So.2d 263 (1962)

In support of its contention that the value of catalogs mailed from New York directly to Louisiana residents is subject to the Louisiana "use tax", the Secretary relies on the statutory language of La. R.S. 47:302A(2) and La. R.S. 47:321A. Pertinent parts thereof are:

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of personal property, when the same is not sold but is used, consumed,

distributed, or stored for use or consumption in this state; provided that there shall be no duplication of the tax.

A. In addition to the tax levied by La. R.S. 47: 302A and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2, except upon drugs, orthotic and prosthetic devices and patient aids prescribed by physicians for personal consumption or use, and except upon food which is exempt under the provisions of Subsection 3 of Section 305 of this Chapter; the levy of said tax to be as follows:

(2) at the rate of one percentum of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; provided that there shall be no duplication of the tax.

The Respondent urges that D.H. Holmes never had sufficient possession of the catalogs to warrant the imposition of the "use tax" against it. This Court cannot agree.

First, it contended that our Louisiana laws specifically exempt interstate commerce from sales and use taxes. But this is clearly not a correct statement of the law. Our Courts have articulated "the test" for determining when a "use tax" can be imposed on articles or goods clearly in interstate commerce. While a state's rights to tax interstate commerce is limited, a tax can be imposed if the tax has substantial nexus with the taxing state and does not discriminate against interstate commerce and provided further, that it is fairly related to services provided by the taxing state. Considering the testimony of Respondent's Vice President - Controller, it is evidence that the distribution of the catalogs was directed toward residents of Lousiana and that the catalogs were intended for the use of D.H. Holmes in increasing its sales to potential customers who are residents of Louisiana. While it is true that a sales or use tax can be defeated by showing that there is a substantial risk of multiple taxation, there is no evidence that any such risk exists. Besides the burden to show such risk is upon the Respondent.

Bunge Corp. vs Secretary of Dept. of Revenue
419 So. 2d 1288 (1982)

This Court has reviewed the several legal authorities, cited by Counsel for Respondent, which would tend to adversely affect the constitutionality of the Louisiana Statute. However, it is clear that our statute was carefully drawn so as to avoid the pitfalls of statutes and jurisprudence emanating from these jurisdictions. A state tax on the activities of an interstate enterprise is valid if:

1) there is substantial nexus between the activity taxes and the taxing state;

2) the tax is fairly apportioned according to the scope of the intrastate business;

3) the tax does not discriminate against interstate commerce.

Our statute clearly comports with that law. It is in many respects the same as the one which has been shown to be viable in Mississippi. And as is obvious from a clear reading of the Bunge case, it has passed muster in our Courts.

A state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way.

Bunge Corp. vs Secretary of Dept. of Revenue,
cited supra.

Complete Auto Transit Inc. vs Brady
430 U.S. 274
97 S. Ct. 1076 (1977)

Once the catalogs reach the residences of the prospective customers to whom they are addressed, Louisiana taxing authority reaches the resting place of the catalogs.

A judgment will be entered accordingly.

This 19th day of July 1985.
NEW ORLEANS, LOUISIANA

s/s Revius O. Ortique
J U D G E

IN THE SUPREME COURT OF THE

STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
Plaintiff and Respondent

versus

D.H. HOLMES COMPANY, LTD.
Defendent and Petitioner

COURT OF APPEAL - FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA-6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

SUPREME COURT
OF LOUISIANA

Jun 29 3:34 PM '87

s/s Frans J. Labranche, Jr.
CLERK OF COURT
(stamp)

COURT OF APPEAL,
FOURTH CIRCUIT
FILED
JUN 29 1987

s/s Danielle Schott
CLERK OF COURT
(stamp)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

NOTICE IS HEREBY GIVEN that D.H. Holmes Company, Ltd., the petitioner and appellant respectively in the above-captioned proceedings, hereby appeals to the Supreme Court of the United States from the final judgment of the Louisiana Court of Appeal, Fourth Circuit, entered on March 16, 1987, and the denial by the Louisiana Supreme Court of the Application for Writ of Certiorari, filed by D.H. Holmes

* This document was prepared in duplicate original and filed with the Louisiana Court of Appeal, Fourth Circuit and the Supreme Court of Louisiana on June 29, 1987. A copy was served on the trial court and on counsel for appellee on the same date.

Company, Ltd., entered by the Louisiana Supreme Court on May 29, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

s/s Kenneth J. Servay
William F. Grace, Jr.
Kenneth J. Servay
Andrew Rinker, Jr.
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone: 585-7000

ATTORNEYS FOR APPELLANT,
D.H. HOLMES COMPANY, LTD.

CERTIFICATE OF SERVICE

I, Kenneth J. Servay, Counsel for D.H. Holmes Company, Ltd.., hereby certify that I have served the foregoing Notice of Appeal to The United States Supreme Court, upon the trial court of record, the Civil District Court for the Parish of Orleans. State of Louisiana, and on all counsel of record, this 29th day of June, 1987, by placing copies thereof, properly addressed to the trial court and each counsel of record, in the United States Mail, First Class Postage prepaid.

NEW ORLEANS, LOUISIANA, this 29th day of June, 1987.

s/s Kenneth J. Servay

IN THE SUPREME COURT OF THE

STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Plaintiff and Respondent,

VERSUS

D.H. HOLMES COMPANY, LTD.,
Defendant and Petitioner

COURT OF APPEAL - FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA - 6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VERSUS

D.H. HOLMES COMPANY, LTD.

SUPREME COURT
OF LOUISIANA

AUG 4 10:21 AM '87

s/s Frans J. Labranche, Jr.
CLERK OF COURT
(stamp)

COURT OF APPEAL,
FOURTH CIRCUIT
FILED AUG - 4 1987

s/s Danielle Schott
CLERK OF COURT
(stamp)

FILED

AUG 4 10:38 AM '87

CIVIL
DISTRICT COURT
(stamp)

SUPPLEMENTAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

NOTICE IS HEREBY GIVEN that D.H. Holmes Company, Ltd., the petitioner and appellant respectively in the above-captioned proceedings, hereby files this Supplemental Notice of Appeal to the Supreme Court of the United States from the final judgment of the Louisiana Court of Appeal, Fourth Circuit, entered on March 16, 1987, and the denial by the Louisiana Supreme Court of the Application for Writ of Certiorari filed by D.H. Holmes Company, Ltd., entered by the Louisiana Supreme Court on May 29, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

**CHAFFE, MC CALL, PHILLIPS,
TOLER & SARPY**

s/s Kenneth J. Servay
William F. Grace, Jr.
Kenneth J. Servay
Andrew Rinker, Jr.
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: 504/585-7000

**ATTORNEYS FOR APPELLANT,
D.H. HOLMES COMPANY, LTD.**

** This document was prepared in duplicate original and filed with the Louisiana Court of Appeal, Fourth Circuit, and the Supreme Court of Louisiana on August 4, 1987. A copy was filed with the trial court, and a copy was served on counsel for appellee on that same date.

STATE OF LOUISIANA
PARISH OF ORLEANS

CERTIFICATE AND AFFIDAVIT OF SERVICE

I, Kenneth J. Servay, Counsel for D.H. Holmes Company, Ltd., and a member of the Louisiana State Bar and the Bar of the Supreme Court of the United States, being duly sworn, do state:

1. That on my behalf and at my instruction, members of my staff originally filed Notice of Appeal to the Supreme Court of the United States in the above captioned matters, together with Certificate of Service, with the Supreme Court of Louisiana and the Louisiana Court of Appeal, Fourth Circuit, on June 29, 1987, and that on that same date, my staff, at my instruction served that notice of appeal and certificate of service by United States Mail, First-Class Postage pre-paid, on the trial court and all counsel of record, as hereinafter listed:

Civil District Court for the
Parish of Orleans, State of
Louisiana
c/o Dan Foley, Clerk of Court
421 Loyola Avenue
New Orleans, Louisiana 70112
Trial Court

Robert G. Pugh, Esq.
Pugh & Pugh
Suite 1200
3300 Marshall Street
Shreveport, Louisiana 71101
As Attorney for Shirley McNamara,

Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana

2. That on August 4, 1987, at my instruction, before instructing my staff to file this Supplemental Notice of Appeal and Certificate and Affidavit of Service with the Court of Appeal, Fourth Circuit, State of Louisiana, and the Supreme Court of Louisiana, and a copy on the Civil District Court for the Parish of Orleans (the trial court), I served a copy of this Supplemental Notice of Appeal and Certificate and Affidavit of Service, on Ms. Shirley McNamara, the sole appellee, by personally mailing to Mr. Robert G. Pugh, Esq., her counsel of record, a copy thereof, properly addressed as set forth in paragraph 1 and First Class Postage pre-paid.

NEW ORLEANS, LOUISIANA, this 4th day of August, 1987.

s/s Kenneth J. Servay
Kenneth J. Servay

STATE OF LOUISIANA
PARISH OF ORLEANS

Sworn to and subscribed before me, Nortary Public, this 4th day of August, 1987.

s/s Harvey G. Gleason
NOTARY PUBLIC, Parish of Orleans, State of Lóuisiana (My commission is for life)

s/s Kenneth J. Servay
Kenneth J. Servay

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

Number 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLEE
SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

October 14, 1987

MID-SOUTH PRESS, SHREVEPORT, LA

QUESTION PRESENTED

Appellant submitted the following QUESTION PRESENTED in its Jurisdictional Statement Page i:

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. Sections 47:302 (A) (2), 47:305 (E) and 48:321 (A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

In the within Motion to Dismiss or Affirm, appellee challenges the accuracy of the concluding phrase in the appellant's QUESTION PRESENTED in that under the laws of Louisiana, appellant was the owner of the merchandise catalogs at the time they came to rest in Louisiana.

LIST OF PARTIES

All parties to the proceedings below and here are the same: D.H. Holmes, Co., Ltd., appellant, and Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana, appellee.

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THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana ["McNamara"], moves the Court to dismiss this appeal, or in the alternative, to affirm the Judgment of the court below on the grounds that (a) the Judgment below rests on an adequate non-federal basis and (b) the appeal does not present a substantial federal question.

Factual Background As Adduced From the Evidence

D.H. Holmes Company, Ltd., ["Holmes"] is a Louisiana corporation organized in 1905 with its principal office located at 819 Canal Street, New Orleans, Louisiana. Holmes operates a department store at 14 Holmes-owned locations in Louisiana, a majority of which are in New Orleans. Others are in Baton Rouge, Hammond, Houma and Lafayette. Holmes has 5,000 employees, 500,000 charge customers, and a million and a half other customers.

For the purpose of securing business, Holmes has had merchandise catalogs printed and distributed to its customers in Louisiana. In addition to this directly secured business, Holmes indirectly secured business with these catalogs by keeping Holmes' name before the public and thereby encouraging people to shop at Holmes. The Louisiana people to whom these catalogs were to be targeted were pre-determined by the sales promotion manager, and mailed shortly prior to promotional sale dates. Even though Holmes purchased and owned these catalogs, the intended recipient would not know of their existence or that he might recieve a catalog. He could not buy a catalog even if he knew of their existence, for Holmes has a policy prohibiting the sale of their catalogs. The return address used on the catalogs is Holmes' Canal Street address, and it was to this address that some of these catalogs were returned. On its face, the catalog contained the instruction "postal carrier, if the resident [addressee] has moved, please leave this with the current resident." Even though Holmes targeted specific people, Holmes admitted that these specific people may not in fact have received the catalog.

Holmes' catalogs are designed in New York City and then printed at one of three locations, Atlanta, Boston or Oklahoma City. None of these catalogs were printed in Louisiana. They could have been printed here, however, but Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere. During the taxable period Holmes published nineteen catalogs, four in 1979, six in 1980 and nine in 1981. Eighty-two percent of these catalogs were sent to pre-targeted Louisiana residents. No taxes were paid to New York on these catalogs, nor to Atlanta, Boston or Oklahoma City. The states where these cities are located do not levy a sales tax on the publishing or printing of catalogs. Louisiana does. Having learned from a routine audit that the

cost of these catalogs by taxable year was: 1979 = $520,000; 1980 = $670,000; and 1981 = $834,000, the Department of Revenue and Taxation for the State of Louisiana assessed Holmes for "use tax" pursuant to Louisiana Revised Statute 47:301, **et seq.** Holmes refused to pay the tax and this suit was brought for its recovery. The taxable amount due was stipulated by the parties.

The Judgment Below Rests on an Adequate Non-Federal Basis - The Statutory ["At Rest"] Issue

The court below held, "after the catalogs were in Louisiana mail boxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." **McNamara v. D.H. Holmes Co., Ltd.**, 505 So.2d 102, 105 (La. App. 4 Cir. 1987). [Jurisdiction Statement Appendix 7A]

In its QUESTION PRESENTED, Holmes asserts that these catalogs were sent "free of charge to the recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana."

By so presenting the QUESTION, Holmes begs another question. Under what circumstances and when did Holmes transfer ownership in the catalogs?

The ownership of property rests on state law. By holding Holmes liable for the use tax, the court below answered the ownership question. Holmes owned the catalogs until the non-expecting, pre-designated recipient accepted the catalogs.

> Thus, Holmes owned these catalogs:
>
> During the New York design process;
>
> During the Atlanta, Boston or Oklahoma printing process;
>
> During the mailing process;
>
> At the time they came to rest in Louisiana by placement into the non-expecting, pre-designated recipient's mail or post office box; and
>
> Until the pre-designated recipient accepted the catalog.

In framing it QUESTION PRESENTED, Holmes would want to equate proprietary interest with possession. However, in Louisiana the ownership and possession of a thing are distinct. "Ownership exists independently of any exercise of it [ownership] and may not be lost by non-use." Louisiana Civil Code Article 481.[1]

In commenting on this article, the redactors observed: "The principle developed by this article is necessary in order to show that the right of ownership can be preserved without the exercise of any act of ownership, and without any actual possession on the part of the owner."

The ownership of a thing may be transferred by a sale, an exchange or by a donation. The transfer of ownership of these catalogs from Holmes to the pre-designated recipient did not occur as the result of a sale or an exchange of property. The transfer of ownership from Holmes to the pre-designated recipient was, and could only be, the result of a donation. [Holmes in its QUESTION PRESENTED has acknowledged the transfer to the recipient to have been a donation by stating that the recipient received the catalog "free of charge" a point reiterated at Pages 6, 7, 8, 12, 13 and 15 of Holmes' Jurisdictional Statement.]

---

[1] During one of the taxable years at issue, 1979, this Article was numbered 496 and read:

> The ownership and the possession of a thing are entirely distinct.
>
> The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such act, or even because another performs such acts without the knowledge or against the will of the owner.
>
> But the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription.

Titles I, II and III of Book II of the Louisiana Civil Code were extensively revised by the 1976, 1978 and 1979 Legislatures. These revisions, which encompass C.C. arts. 448 to 645 and replace former C.C. arts 448 to 645 of the Civil Code of 1870, were made on recommendation of the Louisiana State Law Institute.

The Comments relating to Article 481 state:

(a) This provision reproduces the substance of Article 496 of the Louisiana Civil Code of 1870. It does not change the law.

Property can neither be acquired nor disposed of gratuitously, unless by donations **inter vivos** or **mortis causa**, made in the forms hereafter established. Louisiana Civil Code Article 1467. A donation **inter vivos** (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it. Louisiana Civil Code Article 1468.

A donation produces effects only from the time of its acceptance. Louisiana Civil Code Article 1540. The acceptance can only be made by the donee personally. Louisiana Civil Code Article 1543. There must be "corpus et animus" - the will to enjoy as owner and the fact of enjoyment.

Holmes' catalog official admitted, under examination by the Trial Judge, that if not delivered, these catalogs were returned to Holmes; that the catalogs had a value in excess of their cost; that the ultimate recipient had no way of knowing he was to receive the catalog until he personally accepted it; and that if the catalogs were destroyed in mail by red paint, he did not know what would be Holmes' right to compensation. [As to Holmes' right to recover damages, see, Code of Federal Regulations, United States Postal Service, 39 C.F.R. 281 - Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophies; and 39 C.F.R. 912 - Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service.]

These catalogs having come to rest in Louisiana, while owned by Holmes, and before their acceptance by the non-expecting, pre-designated recipient, the Court below, in applying Louisiana law, was correct in its holding that the catalogs were subject to Louisiana Use Tax.

The Appeal Does Not Present A Substantial Federal Question

Although, admittedly, Holmes posed the Commerce Clause issue in the courts below, it totally failed to adduce any evidence to support its application. Thus Holmes ignored the teachings of this Court that a state tax cannot be invalidated unless its opponents developed a "factual basis on which to declare the tax unconstitutional as applied."

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 750 (1978).

McNamara, on the other hand, although not required to do so, affirmatively established by competent evidence a factual basis upon which the tax would survive a Commerce Clause attack.

McNamara called as her first witness Representative Claude "Buddy" Leach, an attorney and the Chairman of the Louisiana House of Representatives' Ways and Means Committee [to which Committee all tax legislation must be first referred in the Louisiana Legislative process]. Representative Leach testified as to the satisfaction of the four-pronged requirement whereunder interstate commerce may be required to bear its fair share of state taxation, i.e., the taxes (1) "are applied to activity with a substantial nexus with the State," (2) "are fairly apportioned," (3) "do not discriminate against interstate commerce," and (4) "are fairly related to the services provided by the State."

McNamara's next witness was George Silbernagel, the person from the Louisiana Legislative Fiscal Office who had undertaken an exhaustive study of the distribution of Louisiana Tax Funds to the Orleans area. Mr. Silbernagel was also called to establish the satisfaction in this instance of the four-pronged requirement, with particular reference to the services provided by the State to Holmes, its employees and customers.

In furtherance of this line of testimony, Holmes's catalog official, Stewart Cahn, on cross-examination, admitted that taxes on the catalogs were not paid to any other state. He then admitted that the catalogs were designed in New York, without sales or use tax imposed thereon, then printed and shipped, by United States Mail from one of three states which do not charge a sales/use tax thereon [fairly apportioned test]. Holmes' Vice President, Treasurer/Controller, Paul R. Falter, on cross-examination, admitted that Holmes had 500,000 charge customers and 1,500,000 non-charge customers and also stated that Holmes had 5,000 employees and operated stores in fourteen Louisiana locations, both within and without the Orleans area [the nexus test].

Perhaps the non-discriminatory test can best be illustrated by the following exchange between the trial judge, the Honorable Revius O. Ortique, Jr., and Holmes' counsel concerning an oral motion at the conclusion of the trial for a directed verdict with respect to the catalog issue:

THE COURT:

The other thing is, does D.H. Holmes have a right to or any of the department stores, have a right to circumvent the laws of the State by having its catalogs printed out of state and shipped from out of state? Would a person, if they decided that they were going to let Edward Printing Company, which is a local printing company, do their catalogs and mail them, would that be subject to tax?

MR. RINKER:

Yes, it would, your Honor, there's no question. As a matter of fact, the cases[2] that we cited discussed the distinction between those two possibilities saying that if you print them in the State you pay the taxes and if you buy them from out of state, you don't pay the taxes.

THE COURT:

So, you're saying then in effect, in answer to my other question, that Holmes has control over whether taxes are due on certain items and not the legislature of the State of Louisiana?

MR. RINKER:

To some extent, that's correct.

THE COURT:

All right, the motion is denied. The Court is not satisfied.

The nexus requirement states that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **National Bellas Hess v. Illinois**, 386 U.S. 753, 756 (1967); **Miller Brothers Company v. Maryland**, 347 U.S. 340, 344-45 (1954). Holmes, a Louisiana corporation, has 14 stores

---

[2] These cases were from other states and either predate this Court's holding in **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274 (1977), or, if subsequent thereto, make no mention of **Complete Auto Transit's** teachings. Two of these cases, **District of Columbia v. W. Bell & Co., Inc.**, 420 A.2d 1208 (D.C.App. 1980), and **Service Merchandise Co., Inc. v. Tidwell**, 529 S.W. 2d 215 (Tenn. 1975) are cited in the Jurisdictional Statement Pages 11 and 14, and are discussed at Page 12 infra.

in Louisiana, five thousand employees and fifteen hundred thousand customers and an additional 500,000 charge customers. Certainly such a "minimum connection" exists here.

The fairly apportioned requirement relates to the possibility of multiple tax burdens. **See, Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies**, 435 U.S. 734, 746-47 & n. 17 (1978). Here there was nothing to apportion for no taxes were paid elsewhere.

The tax does not discriminate against interstate commerce. Clearly, under the tax, local and interstate commerce are treated alike. This Court has emphasized the importance of judging a tax in operation:

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940). In the case of this tax there is "equality of treatment between local and interstate commerce." **Maryland v. Louisiana**, 451 U.S. at 759 (1981); **accord, Boston Stock Exchange v. State Tax Commission**, 429 U.S. 318, 331-32 (1977); **Henneford v. Silas Mason Co.**, 300 U.S. 577, 583-84 (1937). **See** generally, **Halliburton Oil Well Cementing Co. v. Reily**, 373 U.S. 64, 70 (1963) ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). Holmes during the trial, as previously shown, admitted that if it had chosen to print the catalogs in Louisiana it would be subject to the tax but that it purposely had them printed elsewhere in an attempt to avoid the tax. The taxable rate and thus amount is the same, i.e., if purchased locally (sales tax) it would have been based upon 2% of the cost. The applicable imposition here (use tax) is the same - 2%.

This Court most recently interpreted the services requirement in **Commonweath Edison Co. v. Montana**, 453 U.S. 609 (1981). This Court noted that this part of the four-pronged test "is closely connected" to the nexus requirement. **Id**. at 625-26. This Court concluded:

> When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'"

Id. at 627, quoting **Exxon Corp. v. Wisconsin Department of Revenue**, 447 U.S. 207, at 228 (1980), in turn quoting **Japan Line, Ltd. v. County of Los Angeles**, 441 U.S. 434, at 445 (1979). Certainly, those services are provided for the use at issue here, just as they are performed for any other sales or use concerning which the state levies a tax. The tax is assessed in proportion to activities or presence.

The appellate court below [**McNamara v. D.H. Holmes Co., Ltd.**, 505 So.2d 102, (La. App. 4 Cir. 1987)], in complying with Louisiana's constitutional mandate [Article 5 Section 10 (b)] that its scope of review extends to both law and facts, concluded that these facts, **id**. at 105-106, [Jurisdictional Statement pages A-8 and A-9] meet the four-pronged test and there is no violation of the Commerce Clause and that the record supports the assessment of use taxes on the Holmes catalogs. **Id**. at 106.

In suggesting to this Court that the question is substantial Holmes states:

> While this Court has decided a number of Commerce Clause tax cases dealing with **activities** relating to commerce, and to **goods** sold for profit and shipped in interstate commerce, before and after they left the stream of commerce, no case decided by this Court addresses the issues presented by this case, or the relationship between these recent cases and this Court's long-established rule that **goods** in interstate commerce are not subject to taxation.

[Jurisdictional Statement, Page 8.]

Holmes seems to be trying to draw a distinction as to goods [catalogs] sold for profit and goods [catalogs] given away [by donation] and to limit the holdings of **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274 (1977), and **Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies**, 435 U.S. 734 (1978), to activities and not goods (apparently losing sight, as it does so, of the fact that the Court below found the "use" on which the tax would lie, was an activity, i.e. "distribution.")

This Court, almost half a century ago, discouraged any attempt to pigeonhole state tax matters when, in **Wisconsin v. J.C. Penney Co.**, 311 U.S. 435 (1940) it stated:

> A tax is an exaction. Ascertainment of the scope of the exaction — what is included in it — is for the state court. But the descriptive pigeonhole into which a state court

puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Henderson v. Mayor of New York 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v. State Tax Commission, 286 U.S. 276, 280.

The Constitution is not a formulary. It does not demand of states nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Id. at 443-444.

The **Penney** case was followed a month later by the **Nelson** cases, **Nelson v. Sears, Roebuck & Co.**, 312 U.S. 359 (1941), and **Nelson v. Montgomery Ward & Co.**, 312 U.S. 373 (1941). Both of these cases are Commerce Clause Use Tax cases. In the first case against Sears, Roebuck & Co., this Court held:

> In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v. State Tax Commission, 286 US 276, 280; Southern P. Co. v. Gallagher, 306 US 167, 177; Wisconsin v. J.C. Penney Co. 311 US 435. The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa "has nothing on which to operate." Wisconsin v. J.C. Penney Co. supra. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, "has been withdrawn from the arena of debate." Henneford v. Silas Mason Co., 300 US 577, 583; Southern P. Co. v. Gallagher, supra. It is one of the well-known functions

> of the integrated use and sales tax to remove the buyers' temptation "to place their orders in other states in the effort to escape payment of the tax on local sales." Henneford v. Silas Mason Co. supra. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end." And see Southern P. Co. v. Gallagher, supra. Use in Iowa is what is taxed regardless of the time and place of passing title and regardless of the time the tax is required to be paid. Cf. McGoldrick v. Berwind-White Coal Min. Co. 309 US 33, 49.

Id. at 363.

Holmes, in support of its contention as to the substantiality of the question, cites **Independent Warehouses, Inc. vs. Scheele**, 331 U.S. 70 (1947) [Jurisdictional Statement Page 9]. The quotation from that case, which appears on Pages 9-11 of the Jurisdictional Statement, clearly permits the exaction of a tax when the property comes to rest within a state where it is deemed to be part of the general mass of property within the state and is thus subject to its taxing power. That is precisely what occurred in this case.

Holmes next cites the case of **Michelin Tire Corp. v. Wages**, 423 U.S. 276 (1976) [Jurisdictional Statement Page 11]. Again, in **Michelin**, as in the **Independent Warehouses, Inc.** case, the goods had come to rest and were no longer in transit and this Court found the goods in question to be taxable. Again, the same situation exists here.

Holmes next cites **dicta** from **Miller Bros. Co. v. Maryland**, 347 U.S. 340 (1954) [Jurisdictional Statement Page 11]. In actuality the **Miller** case concerns jurisdiction. The Court refused to sustain a use tax on a Delaware vendor without any connection with Maryland, after stating "[b]ut the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **Id** at 344-345. In the **Miller** case, the Court recognized that certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein. **Id**. at 345. Holmes clearly engages in such activities.

Holmes next cites a state court case, **Service Merchandise Co., Inc. v. Tidwell**, 529 S.W.2d 215 (Tenn 1975) and a District of Columbia case, **District of Columbia v. W. Bell & Co., Inc.**, 420 A.2d 1208 (D.C.App. 1980). Although it is difficult to understand tax decisions of other jurisdictions without an examination of the underlying statutes and their interpretive regulations, the two cited cases are easily distinguishable from this case. In **Service**, the materials were still in interstate commerce at the time Tennessee wished to impose the tax. Here the catalogs had completed their interstate journey and had come to rest. There also exists a factual distinction between **Service** and this case, because in **Service** the materials were only sent upon the request of customers. 529 S.W. 201 at 217. Here they were non-expecting recipients, who had no prior knowledge that they were targeted by Holmes to receive a catalog. The court further found that it was the intention of the parties [i.e., **Service** and the requesting customer] that the interstate journey of the printed matter would continue until it reached the ultimate recipient. 529 S.W. 201 at 219.

The **Bell** case is also distinguishable. There the use tax statute is limited by its terms to "use, storage, or consumption," whereas the Louisiana Use Tax Statute also includes "distribution". The Court below found:

> After the catalogs were in Louisiana mailboxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes "use" by Holmes under the statute and is subject to the tax.

McNamara v. D.H. Holmes, Co., Ltd., 505 So.2d 102, 105 (La. App. 4 Cir. 1987). [Jurisdictional Statement Appendix 7A.]

Conclusion

Wherefore, appellee respectfully submits that the judgment below rests on an adequate non-federal basis and should, therefore, be affirmed, or, in the alternative, the question upon which this case

depends is so unsubstantial as not to need further argument and the appeal should be dismissed.

All of the above and foregoing is thus respectfully submitted.

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SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
APPELLEE

Number 87-267

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SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 13th day of October, 1987, I served copies of Appellee's Motion to Dismiss or Affirm, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record for Appellant at his post office address. His name and address is as follows:

ANDREW RINKER, JR.
CHAFFE, McCALL, PHILLIPS
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300

All parties required to be served have been served.

ROBERT G. PUGH
COUNSEL OF RECORD
SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
APPELLEE

FILED
DEC 23 19
JOSEPH F. SPANIOL, JR
CLERK

No. 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D. H. HOLMES COMPANY, LTD.,
Appellant

v.

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee

**On Appeal from the Court of Appeal,
Fourth Circuit, State of Louisiana**

JOINT APPENDIX

ANDREW RINKER, JR.*
WILLIAM F. GRACE, JR.
KENNETH J. SERVAY
CHAFFE, MCCALL, PHILLIPS,
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ROBERT G. PUGH *
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Counsel for Appellee

* Counsel of Record

JURISDICTIONAL STATEMENT FILED AUGUST 14TH, 1987
PROBABLE JURISDICTION NOTED NOVEMBER 2ND, 1987

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Note: The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix, because they appear on the following pages in the appendix of the Jurisdictional Statement:

Judgment and Opinion, Court of Appeal, Fourth Circuit, State of Louisiana 2A

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 14th, 1983—Plaintiff, Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, Original Petition filed in the Civil District Court for the Parish of Orleans, State of Louisiana.

October 4th, 1983—Defendant, D.H. Holmes Company, Ltd., Original Answer filed.

February 7th, 1984—Defendant's Motion for Summary Judgment filed.

March 16th, 1984—Motion for Summary Judgment denied.

March 19th-20th, 1985—Trial held.

July 19th, 1985—District Court Judgment Rendered in Favor of Plaintiff Assessing Use Tax on Catalogs and Advertisement Materials Shipped by Printers Outside Louisiana.

July 26th, 1985—Defendant's Motion for a New Trial filed.

December 20th, 1985—Plaintiff's Motion for Partial New Trial denied.

March 25th, 1986—Restated Judgment filed.

April 21st, 1986—Defendant's Petition for Devolutive Appeal Court of Appeal, Fourth Circuit, State of Louisiana filed.

March 16th, 1987—Opinion and Judgment of the Court of Appeal, Fourth Circuit, State of Louisiana filed.

May 29th, 1987—Writ of Certiorari and/or Review denied by the Supreme Court of the State of Louisiana.

August 14th, 1987—Jurisdictional Statement of D.H. Holmes Company, Ltd., filed with the Supreme Court of the United States.

November 2nd, 1987—Probable Jurisdiction noted by the Supreme Court of the United States.

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION H

Docket No. 83-15523

SHIRLEY MCNAMARA, SECRETARY
OF REVENUE AND TAXATION, THE DEPARTMENT
OF REVENUE AND TAXATION, STATE OF LOUISIANA

versus

D. H. HOLMES COMPANY, LTD.

PETITION FOR PAYMENT OF DELINQUENT TAXES AND APPLICABLE INTEREST THEREON, TOGETHER WITH STATUTORY ATTORNEYS' FEES[*]

[Filed Sept. 14, 1983]

The petition of SHIRLEY MCNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, acting herein in her official capacity and on behalf of her predecessors and successors in office, domiciled in the City of Baton Rouge, State of Louisiana, ["petitioner"], with respect represents:

1.

That D. H. HOLMES COMPANY, LTD., a Louisiana corporation, organized under the laws of the State of Louisiana, on May 13th, 1905, domiciled at 819 Canal

---

[*] The following Pleadings and Excerpts from the Transcript are reproduced verbatim.

Street, New Orleans, Louisiana 70112, with its principal office located at 819 Canal Street, New Orleans, Louisiana 70112, with its Louisiana registered office at 819 Canal Street, New Orleans, Louisiana 70112, and with its principal business establishment in Louisiana located at 819 Canal Street, New Orleans, Louisiana 70112, and which, on July 17th, 1978, appointed James E. Ammon, 819 Canal Street, New Orleans, Louisiana 70112, as its agent for service of process, is made defendant herein ["defendant"].

2.

That defendant is indebted unto petitioner in the amount of ONE HUNDRED NINETY-SEVEN THOUSAND, FORTY-FOUR AND 99/100 ($197,044.99) DOLLARS, for delinquent Louisiana General Sales Taxes, and interest thereon to May 20th, 1983, due to the State of Louisiana for the tax years beginning on the first day of January, 1978, and ending on the 31st day of December, 1981, ["the taxable period"], together with statutory interest as provided by R.S. 47:1601 from and including the 20th day of May, 1983, on the taxes due, ONE HUNDRED FORTY-SEVEN THOUSAND, TWO HUNDRED FOURTEEN AND 70/100 ($147,214.70) DOLLARS, through the date of the final judgment herein and attorneys' fees in the amount of ten per centum (10%) of the total of said taxes and interest as provided by R.S. 47:1512.

3.

That amicable demand having been made in vain, petitioner proposed to assess the general sales tax due from defendant. On May 3rd, 1983, the Department of Revenue and Taxation issued its assessment notice, a copy whereof being hereunto annexed as Exhibit "A". That

notwithstanding said proposed assessment, defendant has refused to pay the sum due.

4.

That pursuant to the provisions of LA. R.S. 47:1512 petitioner employed PUGH and PUGH, a Louisiana partnership, to assist in the collection of the taxes and interest due, and having referred to an attorney at law for collection the taxes and interest due, payable and unpaid by the defendant, the tax debtor, the petitioner is entitled to recover an additional charge for attorneys' fees in the amount of ten per centum (10%) of the taxes and interest due from the defendant to the petitioner.

5.

Petitioner attaches hereto as Exhibit "B" an agreement to extend prescription as to the taxes, interest and attorneys' fees herein referred to.

WHEREFORE, petitioner prays that this matter be set for trial and after due proceedings had, there be judgment in favor of the petitioner, and against the defendant, in the amounts as follows:

ONE HUNDRED NINETY-SEVEN THOUSAND FORTY-FOUR AND 99/100 ($197,044.99) DOLLARS, for delinquent Louisiana General Sales Taxes, and interest thereon to May 20th, 1983, due to the State of Louisiana for the tax years beginning on the first day of January, 1978, and ending on the 31st day of December, 1981, ["the taxable period"], together with statutory interest as provided by R.S. 47:1601 from and including the 20th day of May, 1983, on the taxes due, ONE HUNDRED FORTY-SEVEN THOUSAND, TWO HUNDRED FOURTEEN and 70/100 ($147,214.70) DOLLARS, through the date of the final judgment herein and attorneys' fees in the amount of ten per centum

(10%) of the total of said taxes and interest as provided by R.S. 47:1512.

/s/ Robert G. Pugh
Of the Law Firm of
PUGH and PUGH
Suite 555
Commercial National Bank
Building
Shreveport, Louisiana 71101
Attorneys for Petitioner

EXHIBIT "A"

State of Louisiana
DEPARTMENT OF REVENUE AND TAXATION
P.O. Box 201
Baton Rouge, Louisiana 70821

FOR ASSISTANCE CALL TOLL FREE INTRASTATE
1-800-272-9855

REVISED

Your Account Number 6034078000

Date of Notice May 3, 1983

D. H. Holmes Co., Ltd.
P.O. Box 60160
New Orleans, LA 70160

Louisiana General Sales Tax 1-1-79/12-31-81

You have 15 days from 5-3-83 for your response to be received by this office. Please give this statement your prompt attention to avoid further penalty, interest and fees. Please return the enclosed copy of this letter with your response.

NOTICE OF TAX DUE

1.	Tax Due	$147,214.70
2.	Interest To 5-20-83	49,830.29
3.	Delinquent Penalty To	—0—
4.	Negligence Penalty	—0—
5.	NSF Check Penalty	—0—
6.	Other Charges (See Remarks)	—0—
7.	Total Lines 1 Thru 6	197,044.99
8.	Less Payments And Credits	—0—
9.	Total Amount Due And Payable	$197,044.99

REMARKS:

In accordance with R.S. 47:1562, this Department proposes to assess you for the tax shown above. The amount of tax results from the following: field audit examination.

/s/ Robert L. Jenkins
ROBERT L. JENKINS
Reviewing Auditor
Audit Review Unit
Sales Tax Section

RLJ:pfb

Enclosures

EXHIBIT "B"

State of Louisiana

DEPARTMENT OF REVENUE AND TAXATION
AGREEMENT TO SUSPEND PRESCRIPTION OF
LOUISIANA GENERAL SALES TAX

Whereas, under the provisions of Article VII, Section 16 of the constitution of Louisiana the prescription of taxes is fixed at three years from December 31 of the year in which the taxes were due; and

Whereas, under the provisions of Section 1580 of Title 47 of the Revised Statutes of 1950, the prescription of taxes may be suspended by means of an agreement between the taxpayer and the Secretary of Revenue and Taxation; and

Whereas, there exists a dispute between the Secretary of Revenue and Taxation and D. H. Holmes Company, Inc., as to the amount of Louisiana General Sales Tax owed for the years 1-1-79/12-31-79; and

Whereas, both the taxpayer and the Secretary of Revenue and Taxation desire to have additional time within which to discuss the legal questions and facts involved, it is hereby agreed that the Secretary of Revenue and Taxation shall not finally assess nor bring suit for collection of such taxes prior to February 1, 1983, and the taxpayer agrees that the running of the period of prescription against the assessment or collection of any such tax due and owing the State of Louisiana for the years covered by this agreement is hereby suspended for a period of one year from December 31, 1982, and that any such tax may be assessed or suit instituted for the collection thereof at any time between the dates of February 1, 1983 through December 31, 1983, and that the taxpayer will never plead prescription to any claim for taxes which are the subject of the agreement for the

period stated above if such taxes are assessed or suit brought for the collection thereof before the expiration of the time set out herein.

Signed at New Orleans this 6th day of October 1982

Paul R. Falter
By Paul R. Falter

D. H. HOLMES COMPANY, LTD.
Signature of taxpayer

Title: Vice President-Controller

Baton Rouge, Louisiana this 7 day of Oct. 1982.

SHIRLEY MCNAMARA
SECRETARY OF REVENUE AND TAXATION

By: /s/ [Illegible]

Title

STATE OF LOUISIANA:

PARISH OF CADDO :

BEFORE ME, the undersigned authority, came and appeared ROBERT G. PUGH, attorney for Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana, petitioner in the foregoing suit, who after being duly sworn did state that all the allegations of fact contained in the foregoing petition are true and correct to the best of the affiant's knowledge and belief, and that this affidavit is being made pursuant to LA. R.S. 13:5034.

/s/ Robert G. Pugh
ROBERT G. PUGH

SWORN TO AND SUBSCRIBED before me this 12th day of September, 1983.

/s/ Robert G. Pugh, Jr.
Notary Public in and for
Caddo Parish, Louisiana

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "H"

No. 83-15523 Docket No. 4

(Title Omitted in Printing)

ANSWER TO PETITION

[Filed Oct. 14, 1983]

NOW INTO COURT, through undersigned counsel, comes D. H. Holmes Company, Ltd. ("Holmes"), who for answer to the Petition, with respect, says:

I.

Defendant admits the allegations set forth in Paragraph 1 of the Petition.

II.

Defendant denies all and singular the allegations set forth in Paragraph 2 of the Petition.

III.

Defendant admits that it received a Revised Proposed Assessment, dated 3 May 1983, and denies all and singular the remaining allegations set forth in Paragraph 3 of the Petition.

IV.

Defendant denies all and singular the allegations set forth in Paragraph 4 of the Petition.

V.

Defendant avers that no answer is required by it to the allegations set forth in Paragraph 5 of the Petition, but, if an answer is required, the same is denied.

AND NOW, FURTHERING ANSWERING, DEFENDANT HOLMES AVERS AS FOLLOWS:

VI.

The claim for taxes, interest, penalties, etc. for the calendar year 1978 is barred by prescription.

VII.

The claim for interest, penalties, attorney fees and other charges for the calendar year 1979 is barred by prescription.

VIII.

A portion of the taxes, interest, penalties, attorney fees and other charges which petitioner seeks to recover relates to the sales of food sold for preparation and consumption in the home and is specifically exempt from the sales tax.

IX.

Regulation 47:305, which purportedly authorizes the taxation of loose candy is invalid for the following reasons, to-wit:

(a) The Secretary had no authority to promulgate the regulation;

(b) The regulation in question goes beyond the power and authority granted to the Secretary;

(c) The regulation is inconsistent with the statute that it purports to construe;

(d) The regulation imposes a tax where none is imposed by statute; and

(e) The regulation is vague, ambiguous and unconstitutional.

X.

The taxes imposed upon Holmes are unconstitutional in that they violate the interstate commerce clause of the constitution of the United States of America and the Revised Statutes of the State of Louisiana.

WHEREFORE, defendant Holmes prays that this its answer to the petition of Shirley McNamara, Secretary of Revenue and Taxation, be deemed good and sufficient and that, after all due proceedings be had, there by judgment rendered herein in favor of the defendant and against the petitioner, dismissing the petition with prejudice and at plaintiff's cost and for all general and equitable relief.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ William F. Grace, Jr.
WILLIAM F. GRACE, JR.
ANDREW RINKER, JR.
1500 First NBC Building
New Orleans, LA 70112
Telephone: (504) 568-1320

Attorneys for D. H. Holmes Company, Ltd.

(Certificate of Service Omitted in Printing)

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "H"

No. 83-15523 Docket 4

(Title Omitted in Printing)

MOTION FOR SUMMARY JUDGMENT

[Filed Feb. 7, 1984]

Defendant, D.H. Holmes Co., Ltd., moves for summary judgment, pursuant to Louisiana Code of Civil Procedure articles 966-968, dismissing the claim of the plaintiff, Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana, on the grounds that the pleadings on file, together with the affidavit of Paul R. Falter and the answers to interrogatories, show that there is no genuine issue as to any material facts and that mover is entitled to judgment as a matter of law. Further grounds for this Motion are set forth in the Memorandum submitted herewith.

Respectfully submitted,

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ Andrew Rinker, Jr.
WILLIAM F. GRACE, JR.
ANDREW RINKER, JR.
1500 First NBC Building
New Orleans, LA 70112
Telephone: (504) 568-1320

Attorneys for Defendant,
D. H. Holmes Co., Ltd.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "H"

(Title Omitted in Printing)

ORDER

IT IS ORDERED that plaintiffs, Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, show cause on the 17th day of February 1984, at 9:00 A.M. why summary judgment in favor of defendant D. H. Holmes Company, Ltd. should not be granted as prayed for.

New Orleans, Louisiana, this 8th day of February, 1984.

/s/ Gretta R. Burns
GRETTA R. BURNS
Minute Clerk
Division "H"
By Order of the Court

Feb. 17, 1984 Cont'd to 3/16/84

Mar. 16, 1984 S.J. as to Tax on Catalogs is denied.
S.J. as to Retail Sales on Candy is referred to the merits.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "H"

(Title Omitted in Printing)

MOTION FOR A NEW TRIAL

[Filed July 26, 1985]

Now into court, through its undersigned counsel, comes D.H. Holmes Company, Ltd., defendant in the above entitled and numbered cause, and respectfully represents that:

I.

The judgment rendered against D.H. Holmes Company, Ltd. herein on the 19th day of July 1985, is contrary to the law and the evidence, in the following particulars:

1. With respect to the sales tax on candy sold at the Holmes candy counters, the reasons set forth in the Judgment indicate that the candy is exempt from taxation under La.R.S. 305(4)(a)(xiv), yet the judgment imposes tax on the sale of such candy.

2. The sale of candy by Holmes is clearly exempt from the imposition of the sales tax.

3. The imposition of a "use" tax on catalogs shipped to select residents of Louisiana from out of State is in clear violation of the interstate commerce clause of the United States Constitution.

II.

Defendant, D.H. Holmes Company, Ltd. is aggrieved by the said judgment and desires and is entitled to a new trial.

WHEREFORE, defendant prays that Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, the plaintiff herein, be duly ordered to appear at a date and hour to be fixed by this court and show cause why the judgment rendered herein on the 19th day of July, 1985, should not be set aside and annulled and why a new trial should not be granted.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ Andrew Rinker, Jr.
WILLIAM F. GRACE, JR.
ANDREW RINKER, JR.
1500 First N.B.C. Bldg.
New Orleans, LA 70112
568-1320

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

ORDER

Considering the foregoing application for a new trial, let Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, be and she is hereby ordered to show cause in this court on the 29 day of August, 1985, 9 a.m., why the judgment rendered herein on the 19th day of July 1985, should not be set aside and annulled, and a new trial granted in this matter.

New Orleans, Louisiana, this 29th day of July, 1985.

/s/ Joseph T. Katz
JOSEPH T. KATZ
Minute Clerk
Division "L"

By Order of the Court

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "H"

(Title Omitted in Printing)

PETITION FOR DEVOLUTIVE APPEAL

[Filed April 21, 1986]

The petition of D.H. Holmes Company, Ltd., defendant in the above numbered and entitled cause, with respect represents:

1.

Defendant is aggrieved by the judgment read, rendered and signed in this cause, as that judgment relates to the use tax on catalogs, on the 19th day of July, 1985, granting judgment in favor of plaintiff, as said judgment is contrary to the law and the evidence.

2.

Defendant's motion for a new trial on the issue of the use tax on catalogs was denied on March 25, 1986.

3.

Defendant desires to appeal devolutively from the aforesaid judgment rendered against it, but solely as to that portion of the judgment imposing a use tax on the merchandise catalogs.

WHEREOF, defendant, D.H. Holmes Company, Ltd., prays that it be granted a devolutive appeal in the above numbered and entitled cause from the judgment read,

rendered and signed against it on March 25, 1986, but solely as to that portion of the judgment imposing a use tax on the merchandise catalogs, returnable to the Court of Appeal, Fourth Circuit, State of Louisiana, within the delays provided by law.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ Andrew Rinker, Jr.
WILLIAM F. GRACE, JR.
ANDREW RINKER, JR.
1500 First N.B.C. Building
New Orleans, Louisiana 70112
(504) 568-1320
Counsel for
D.H. Holmes Co., Ltd.

ORDER

Considering the foregoing petition:

LET D.H. Holmes Company, Limited, be and it is hereby granted a devolutive appeal from the judgment read, rendered and signed by the court on the 25th day of March, 1986, on the issue of the use tax on the merchandise catalogs, returnable to the Court of Appeal, Fourth Circuit, State of Louisiana, on the 20th day of June, 1986.

New Orleans, Louisiana, this 22nd day of April, 1986.

/s/ Revius O. Ortique
REVIUS O. ORTIQUE
District Judge

(Certificate of Service Omitted in Printing)

PLAINTIFF'S EXHIBIT NO. 1

[STATE SEAL]

STATE OF LOUISIANA
Legislative Fiscal Office
Baton Rouge

[Filed Mar. 20, 1985]

TO: The Honorable John J. Hainkel
Speaker of the Louisiana House of Representatives

FROM: Mark C. Drennen
Legislative Fiscal Officer

DATE: November 17, 1982

SUBJECT: Assessment of Potential Impact to State and Local Governments As Result of Recent Court Decision in City of New Orleans vs. State of Louisiana

In attempting to assess the potential impact of the recent court decision returned by Division I, Civil District Court for the Parish of Orleans (*the City of New Orleans and the Honorable Ernest N. Morial, Mayor, versus the State of Louisiana*), it is necessary to define three broad areas of state-local inter-relationships which are involved.

First, the case in question directly impacts fundirg and operations of the offices identified in the suit that are located in New Orleans. Additionally, those other local governmental units which have home-rule charters (parish or municipality) and perform similar functions named in the suit could pursue the same avenue of redress as New Orleans if the higher courts uphold the original decision. Moreover, all other parishes are subject to some mandates and are potential litigants against the state. Thus, fiscal impacts need to be estimated for

New Orleans as described by the suit and they must be estimated for the same as a whole.

Second, upwards of one-third of the annual state appropriations budget is comprised of funds which are distributed to local governmental units. Included in these funds to local government are supplemental pay to firemen, police, sheriff's deputies, coroners, constables, and marshalls; parish road funds; mass transit funds; revenue sl aring; severance, tobacco, and beer taxes; and racetrack funds among others. Also included are funds distributed through various state departmental budgets which share costs of some functions or reimburse local governments for responsibilities of state government administered by local units—examples include support of registrar of voters operations, district attorneys, and maintenance of state prisoners in parish jails.

The third area of impact involves funds provided by the state to local non-governmental bodies. This group of funds represents payment for services and programs which directly benefit the various locales and which in the absence of state funding local governments could potentially be responsible for providing.

The remainder of this report will covere: 1) costs to the state for assuming local officers impacted in the recent decision for New Orleans alone and the state as a whole; 2) funds flowing from the state to local governmental units; and 3) funds flowing from the state to local non-governmental organizations for various programs and services.

Offices/Functions Affected by Lawsuit

Data displayed in Table 1 is made up of two parts. Part A provides a comparison between the costs the City of New Orleans claims are mandated by the state and the actual salary/staffing levels established in the statutes in question. Part B provides an estimate of the

costs to the state, if the state is required to assume total operations of the offices of the coroner, district attorney, registrar of voters, and judiciary.

Table 1, Part A shows that for all offices/functions identified in the lawsuit the City of New Orleans claims the state mandates spending of $18,773,392. As a comparison, a review of the statutes by the Fiscal Office indicates that a total of only $4,359,581 is actually incurred by New Orleans as a result of state mandates. (If the state is required to fund these offices, there is no requirement that we fund them to the extent that the city currently provides funding.)

To identify the differences, it is necessary to review the statutes for each office to determine explicit statutory staffing/salary mandates. Statutory provisions about the Criminal Court messengers provide for a Chief Messenger to be paid $1,800 a year with other messengers to receive $1,500 per year. Using the present staffing of eleven messengers it can be computed that this mandates a total annual cost of $16,300 (assuming one chief and 10 others); however, the City claims costs of $94,139 for these 11 people.

For the Coroner the statute mandates 10 personnel at varying salary levels for a total annual cost of $37,640. The City's budget, by contrast, shows 44 personnel with an annual cost of $726,855.

Statutes covering the Criminal Court Clerk and Deputies require a clerk at $8,500 per year, one chief deputy at $4,200 per year, property clerks at $3,600 per year, and other deputies at $2,760 per year each. No staffing requirements beyond the Clerk and Chief Deputy are mandated. Using the current staffing as presented in the City's budget indicates that the annual cost is $246,820 compared to the $1,248,741 claimed by the City for the 85 employees.

Salaries for the Criminal Court Jury Commissioners are set by law at $4,200 a year with $4,000 a year for each secretary. Given the current five commissioners and four secretaries this computes to a total cost of $37,000 annually. By contrast the city claims costs of $60,200 for the same personnel.

Civil Court Clerks' salaries are set at $3,600 per year by law. Based on current staffing (12) this necessitates an annual cost of $43,200. The City claims the impact is $77,275 for these personnel.

The state, by statute, provides that the City fund $6,600 per year for the Chief Deputy Registrar of Voter and $6,200 a year each for assistant. Assuming one chief and 32 assistants per current staffing levels this means a total annual cost of $205,000; whereas, the City claims an annual cost of $386,414.

With respect to the Criminal Sheriff the city claims that statutory mandates result in an annual cost of $12,696,021. Statutory provisions direct the governing authority to set salaries and budget sufficient funds annually to provide for this office's operation. Thus, there are no specific staffing and/or salary requirements. The contention is made that this office's operation is a state corrections function and that the criminal sheriff is responsible for incarceration of persons who have violated state statutes; thus, the sheriff is performing a state function. Presently, *the state does provide funds* for the maintenance, feeding, and other costs associated with the security of *state* prisoners. By statute the state has defined what constitutes a *state* prisoner and provides $18.25 per day per prisoner to Orleans (and other parishes) to pay local corrections operations for the costs incurred. In the last fiscal year the state provided $2,057,486 for state prisoners located in New Orleans. The state does not, by contrast, pay local governments for persons who are incarcerated for violating munici-

pal or parish ordinances. Nor does the state pay for costs associated with incarceration of persons who have not been convicted of violating state statutes.

The section of law covering pay for the District Attorney, Assistants, and other staff states that the state shall pay no less than $20,000 for the salary of the D.A. and the City shall appropriate such amount for salary as deemed necessary. Further, the City is directed to appropriate no less than $124,000 for assistants, other staff, and office expenses. This is the only amount required to be actually appropriated by the City.

For the salary and expense fund of the Board of Assesors, state law directs the City to annually remit $75,000. This compares to the claimed cost of $430,000 per year.

Concerning New Orleans City Park, recent statutes enacted in the Regular 1982 Session direct the City to appropriate annually to the City Park Improvement Association no more than $350,000; no minimum is set.

In the suit no dollar cost was attached to housing the Orleans Parish Juvenile Court and ten sections of Criminal District Court. To realistically determine an impact on these items it would be necessary to know at a minimum: space requirements (square footage and/or unique requirements), appropriate space costs within market area, availability of requisite housing facilities, utility costs, maintenance costs, and janitorial costs. To effectively evaluate current staff requirements of the offices under litigation it would be necessary to analyze data describing agency/program goals, work-load measures, and job classifications among other factors.

Table 1, Part B provides a projected estimate, statewide, of the fiscal impact if the state was required to assume responsibility for the following offices in the lawsuit—District Attorneys, Registrar of Voters, Coroner,

and Judiciary. The data used to compile this estimate is derived from the "Louisiana State-Local Fiscal Study Report" which was performed by the Legislative Fiscal Office. This estimate is for all parishes regardless of whether there is a homerule charter or not and, as such, this represents a worst case impact scenario. As noted in the table this estimate does *not* include any costs associated with office space, utilities, janitorial or maintenance services. The total state-wide fiscal impact (excluding New Orleans Parish Criminal Sheriff's Office) is estimated at approximately $50 million in fiscal year 1983-84. Since space costs, utilities, and so forth are not included in the estimate, it can reasonably assumed that this estimate is lower than if these other considerations were included. They were not included since this type data were not collected in the original database. The database as used includes expenditures for the fiscal year ending in 1980. Projection assumptions of the annual increase in expenditures is 10% for 1981-82 and 5% thereafter.

TABLE 1

COST REQUIRED TO FUND LOCAL OFFICES IMPACTED BY COURT DECISION

A. *Estimated Impact of Assuming Costs of Offices Identified in Court Decision—Comparison of Claimed Mandates with Explicit Statutory Provisions:*

Office/Function	Statutory Provisions/ Legal Citations	Estimated Cost Based on Statutory Provisions (Statutory Staffing)	Alleged Cost as Presented By New Orleans in Lawsuit (Current Staffing)
1. Criminal Court— Chief Messenger and Other Messengers	R.S. 13:1374/ (1) Chief Messenger @ $1,800/year Messenger @ $1,500/year	$ 16,300(a) (1) (10)	$ 94,139(11) (1) (10)
2. Coroner and Assistants	R.S. 33:1621/ (1) Coroner @ $12,000/year (2) Asst. Coroners @ $5,800 ea./year (1) Assistant @ $1,200/year (1) Chief Clerk @ $2,520/year (1) Engineer @ $2,520/year (2) Clerks @ $1,920 ea./year (2) Morgue Keepers @ $1,980 ea./year	$ 37,640(10)	$ 726,855(44)
3. Criminal Court— Clerk and Deputies	R.S. 13:1371, 13:1372/ (1) Clerk @ $8,500/year (1) Chief Deputy @ $4,200/year Property Clerk @ $3,600/year Other Deputies @ $2,760/year	$ 246,820(b) (1) (1) (6) (77)	$ 1,248,741(85) (1) (1) (6) (77)

4. President— Board of Assessors	R.S. 47:1910/ $154,000/year	$ 154,000(1)	$ 154,000(1)
5. Criminal Court— Jury Commissioners	R.S. 15:111/ Commissioners @ $4,200 ea./year Secretary @ $4,000/year	$ 37,000(9) (5) (4)	$ 60,200(9) (5) (4)
6. Civil Court Criers	R.S. 13:1302/ Crier @ $3,600 ea./year	$ 43,200(12)	$ 77,275(12)
7. Juvenile Court Clerk	R.S. 1587 (A), (B)/ (1) Clerk Other personnel as deemed necessary for court. Budget sufficient funds.	$1,363,135	$ 1,363,135(71)
8. Registrar of Voters	R.S. 18:59/ Chief Deputy @ $6,600/year Assistants @ $6,200/year	$ 205,000(33)	$ 386,414(33)
9. Criminal Sheriff	R.S. 33:1525/ Governing authority of New Orleans will set salaries and pay for personnel.	$2,057,486(d)	$12,696,021(792)
10. District Attorney and Assistants	R.S. 16:71 (C), (D)/ District Attorney—State pays $20,000/ Other pay is discretionary by city. Assistants @ $124,000 total	$ 124,000(c)	$ 1,186,612
11. Board of Assessors	R.S. 1910.2/ $75,000 for Board per year	$ 75,000	$ 430,000

Office/Function	Statutory Provisions/ Legal Citations	Estimated Cost Based on Statutory Provisions (Statutory Staffing)	Alleged Cost as Presented By New Orleans in Lawsuit (Current Staffing)
12. City Park Improvement Association	R.S. 36:209 (M)/ Provides that city of New Orleans appropriate no more than $350,000.	—0—	$ 350,000
TOTALS		$4,359,581	$18,773,392

(a) No staffing levels mandated; estimate assumes 1 Chief Messenger and 10 others based on current N.O. city budget.

(b) No staffing levels mandated; estimate assumes 1 Clerk of Court, 1 Chief Deputy, 6 Property Clerks, 77 Deputies based on current N.O. budget.

(c) State pays $20,000 for D.A.'s salary; no other salary is mandated but is discretionary by local government. State mandates the city pay a total of $124,000 annually for Assistant D.A.'s.

(d) Estimate is based on the fees paid to the City of New Orleans to maintain State prisoners. Prisoners become the responsibility of the state upon conviction of state statute or felony (R.S. 15:566). The state pays $18.25 per day per qualified prisoner for all costs that the parish prison incurs in handling, maintaining, feeding, and sheltering the prisoners.

TABLE 2: Funds to Local Governmental Units
(FY 1982-83 Unless Otherwise Noted)

Dept./Agency	Purpose/Recipient	New Orleans		Balance of State
I. Statutory/Budget Unit Appropriations:				
Judiciary	Various Judicial Offices	$ 4,600,690		$ 2,098,434
Executive/Vet. Aff.	Parish Service Offices	90,240		1,409,760
/State Pl.	Planning Districts	(A)		320,000
/Comm. Law Enforcement	Law Enforcement Districts	399,938		1,504,527
Elections	Reg. of Voters	257,271	(E)	1,797,687
Commerce	Econ. Development Districts	(A)		287,000
CRT/St. Libraries	Parish Libraries	224,741		1,502,669
/Tourism		(B)		200,000
/Div. of Arts		1,106,680		535,270
/Secretary	City Park-New Orleans	285,000		(F)
DOTD	Soil/Water Conservation Districts	(C)		1,666,166
	Reg. Transit Authority	(C)		129,050
	Public Improvements Fund	(C)		21,345,200
	Aviation Improvement Fund	(C)		5,446,646
	Water Shed Improvement	(C)		1,047,776
	Sec. Emergency Fund	(C)		3,600,000
Public Safety	Supp. Police Pay	4,108,826	(E)	9,570,373
	Supp. Deputy Sheriff Pay	1,576,592	(E)	13,045,234
	Supp. Const./J.P. Pay		(E)	461,550
	Supp. Firemen Pay	2,845,111	(E)	4,919,584
	Law Enf. Comms. Network	24,618		714,420

Dept./Agency	Purpose/Recipient	New Orleans		Balance of State
DHHR/HS & EQ	Health and Sanitation	1,505,380(D)		
Corrections	Special Impact Funds	6,000		57,000
	Maint. State Prisons	2,057,486	(E)	3,404,739
Rev. & Tax/Tax Comm.	Asst. to Parish Assessors	20,130		935,870
DUCA	Econ. Dev. Dists.	(A)		80,000
DOE	Bossier Community College			102,178(+)
	Elem. & Secondary Education			662,100(+)
	Voc. Ed.	113,048(+)		4,111,387(+)
	Instruct. Services	421,499(+)		3,492,720(+)
	Elem. & Secondary Education	614,554(+)		4,499,267(+)
	Driver Safety	15,375(+)		984,625(+)
	Adult Education	400,000(+)		4,770,941(+)
	Food & Nutrition	834,476(+)		7,588,940(+)
	Educational Support	1,798,456(+)		15,032,139(+)
	Special Education	792,028(+)		6,444,680(+)
Miscellaneous	New Orleans Cor. Off.	57,350		
	Board of Jury Comm.—N.O.	322,313		
	General Asst.	8,616,036		8,616,036
	Tourist Promotion—N.O.	719,200		
	Act 272 of 1970	700,000		
	Board of Assessors—N.O.	794,930		
	Racetrack	2,343,150		5,299,864
	Tobacco	4,410,214	(E)	20,794,604
	Mass Transit	8,890,222	(E)	3,603,039
	Coroner Supp. Pay	2,740	(E)	373,784
	LIFE-Local Gov't Asst.	9,278,850	(E)	60,721,150
	Parish Road Funds	2,788,752	(E)	43,711,248
	2% Fire Insurance Rebate	600,880	(E)	4,011,634
	Beer Tax	808,860	(E)	4,553,926
	Supp. Revenue Sharing	1,387,401		9,888,249
	Sub-total	$ 65,819,037	(E)	$ 281,936,727
II. Constitutional Distributions				
Revenue Sharing		11,073,960		78,926,040
Royalty Funds		597,392	(E)	31,782,918
Severance Tax		109,643	(E)	29,164,519
DOE/MFP (G)		84,962,382(+)		839,820,451(+)
	Totals	$162,562,414		$1,261,630,655

A = Multi-parish jurisdictional units/services provided to all parishes within district.
B = New Orleans receives an appropriation under miscellaneous for tourist promotion.
C = Projects performed on state-wide, district-wide, parish bases—difficult to determine specific impact per parish.
D = Commingled state and federal funds.
+ = Prior to 4.4% cuts.
E = 1981-82 distributions.
F = Other recipients are non-governmental.
G = Constitution does not provide a particular funding level.

Statewide Costs for Assuming:

District Attorneys, Registrar of Voters, Coroner, Judiciary	Estimated Cost
	$49,551,764 *

* This estimate does *not* include costs associated with office space, utilities, janitorial, or maintenance services. This estimate assumes assumption of costs for all parishes regardless of homerule status. The costs for the New Orleans Criminal Sheriff is excluded as the state currently reimburses the parish for costs associated with the maintenance of state prisoners.

ATTACHMENT A

TABLE 3: Funds to Non-governmental Units
(FY 1982-83 Unless Otherwise Noted)

Dept./Agency	Purpose/Recipient	New Orleans	Balance of State
EXECUTIVE /Comm. on Law Enforcement Districts	Basic Training Grants	—0—	$ 476,117(A)
/Elderly Affairs	Senior Citizen Centers	$ 1,327,356	2,360,909
CRT/Secretary	Museums, Festivals	70,000	261,200
DHHR/OHD	Day Care	480,814	191,305
	Health Related-Homemaker	21,694	689,145
	Housing Improvement	111,224	—0—
	Protection for Children	—0—	54,150
	Respite Care	—0—	1,382,258
	Socialization	618,393	210,566
	Substitute Care	—0—	83,639
	Training and Treatment	75,810	—0—
	Transportation	25,002	180,945
	Residential Community Adj. Counseling	—0—	393,651
	Community Planning for Services to Children	—0—	66,000
DHHR/OMR	Supervised Apartment Living	99,300	117,870
	Intermediate Community Homes	10,100(B)	108,300(B)
DHHR/OMHSA	Drug Rehabilitation	1,014,907(B)	—0—
	Substance Abuse	1,030,613(B)	853,443(B)
	Mental Health	180,200(B)	886,030(B)
DHHR/OMR	Day Developmental	1,106,955	8,733,163
DHHR/DYS	Shelter Care for Preadjudicated Children	150,000	914,554

Dept./Agency	Purpose/Recipient	New Orleans	Balance of State
Environmental Quality	Health Services	1,095,000	—0—
Corrections	Employment Ex. Inc.	—0—	57,000
Revenue & Taxation	Wagering Funds	27,800	1,441,000
DUCA	Community Action Agencies	20,000	1,060,000
	Community Development Associations	333,676	25,000
DOE			
/Elem. & Sec. Educ.		515,000	30,000
/Adult Education		336,333	428,782
/Auxiliary Programs		280,000	—0—
/Research and Development		778,409	700,110
/Special Education		712,195	3,278,962
/Driver Safety Education		37,325	112,675
/Food and Nutrition		644,788	469,212
/Educational Support		759,434	2,006,784
DOE/MFP	Non-Public School Admin. Costs	2,420,000	3,080,000
Board of Regents	Aid to Private Education Universities	2,904,454(A)	238,894(A)
	Tulane Medical School for Louisiana Students	597,500(A)	—0—
	Totals	$17,784,288	$30,891,664

A = Post 4.4% budget adjustments.

B = Commingled state and federal funds.

PLAINTIFF'S EXHIBIT 5

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Fat City
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Downtown Store 135 Baronne 581-3888
HOLMAN VOCATIONAL CENTER
1515 S Saiceda 822-7196
Holmes Blowers 2926 Canal 822-5600
Holmes D H Cafeteria 561-6140

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Men's 349-3264
Appliance—
Major 349-3125
Small Electric 349-3235
Bath Shop 349-3134
Boys—
Sizes 8 To 12 349-3135
Bridal Registry 349-3163
Candy 349-3143
China 349-3158
Cosmetics 349-3100
Dresses—
City Park 349-3203
Daytime 349-3207
Miss D H H 349-3207
Designer 349-3207
Junior 349-3224
Today's Woman 349-3208
Factory 349-3210
Foundations 349-3213
Furniture 349-3215
Infants Furniture 349-3240
Gifts 349-3129
Girls—
Sizes 1-3 & 2-4 349-3136
Sizes 7 To 14 349-3136
Accessories 349-3221
Gloves 349-3231
Gourmet 349-3143
Handbags 349-3231
Hosiery 349-3234
Housewares 349-3235
Infants 349-3240
Jewelry—
Costume 349-3243
Fine 349-3242
Watches 349-3244
Lamps & Shades 349-3246
Linen—
Bed 349-3249
Table 349-3150
Lingerie—
Foundations 349-3213
Sleepwear 349-3254
Major Appliance 349-3125
Maternity Shop 349-3207
Men's Clothing—
Suits 349-3259
Furnishings 349-3260
Sportswear 349-3262
Pictures & Frames 349-3246
Shoes—
Children 349-3287
Men's 349-3289
Continued On Next Column

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HOLMES D H CO LTD—
Belle Promenade Shopping Center—
Shoes—
Women's Better 349-3230
City Park 349-3230
Silverware 349-3158
Sportswear—
Pontchartrain 349-3274
City Park 349-3270
Junior 349-3224
Updated 349-3275
St Charles 349-3273
Stationery 349-3232
Stationery-Cards 349-3233
Service Departments—
Alterations 349-3116
Cashier 349-3190
Credit 349-3181
Delivery 734-3437
Employment 349-3209
Gift Wrap 349-3145
Monogram 349-3116
Personnel 349-3209
Shopping Service 561-6714
Ticket Center 561-6295
NOTE: You May Dial Direct To The Desired Departments Listed Below
For Departments Not Listed In The Downtown Store Dial 561-6611
CANAL STREET STORE—
819 Canal 561-6611
Appliances—
Major 561-6124
Small Electric 561-6235
Bath Shop 561-6130
Blouses-City Park 561-6300
Books 561-6134
Boys Clothing—
Sizes 4 To 7 561-6319
Sizes 14 To 20 561-6136
Bridal Salon 561-6137
Bridal Registry 561-6317
Cafeteria 561-6140
Candle Shop 561-6219
Candy 561-6143
Candy 561-6144
Car Care Center—
Chef Menteur 561-6145
Rampart Street 561-6147
Cards—
Greeting Card Counter 561-6311
Children Accessories 561-6117
China & Crystal 561-6162
Coats-Ladies 561-6168
Confectionery 561-6218
Cosmetics 561-6611
Cosmetics-Men's 561-6258
Draperies 561-6159
Dresses—
City Park 561-6207
Daytime 561-6204
Designer 561-6139
Esplanade 561-6207
Junior 561-6202
Miss D H H 561-6207
Women's World 561-6204
Social Occasion 561-6206
Better 561-6200
Factory-Young Men's 561-6210
Fashion Accessories 561-6228
Foundations 561-6213
Furniture-Bedding 561-6215
Furs-Storage 561-6214
Gifts 561-6219
Girls Clothing—
Sizes 4 To 6x 561-6117
Sizes 1 To 4 561-6319
Sizes 7 To 14 561-6221
Gloves 561-6230
Gourmet 561-6225
Hair Salon 561-6131
Hair Salon Outback 561-6151
Handbags 561-6230
Hearing Aids 561-6232
Hosiery 561-6234
Housewares 561-6235
Infants 561-6240
Jewelry—
Costume 561-6243
Fine 561-6475
Lamps-Shades 561-6246
Linen—
Bath 561-6130
Other Linens 561-6249
Table 561-6250
Lingerie—
Foundations-Daywear 561-6213
Loungewear-Robes 561-6254
Sleepwear 561-6146
Luggage 561-6255
Continued On Next Column

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HOLMES D H CO LTD—
CANAL STREET STORE—
Men's Clothing—
Furnishings-Sportswear 561-6264
Pants 561-6263
Suits & Coats 561-6259
Ties 561-6260
Millinery & Wigs 561-6226
Optical 561-6269
Outback-Deli 561-6886
Pictures-Mirrors-Frames 561-6277
Portrait Studio 561-6276
Radios & Records 561-6278
Restaurant 561-6321
Rugs 561-6281
Rugs Oriental 561-6280
Sewing Machines 561-6283
Shoes—
Women's 561-6292
Children 561-6287
City Park 561-6291
Junior 561-6291
Men's 561-6289
Repair 561-6285
Silverware 561-6293
Sporting Goods 561-6298
Sportswear—
Designer Shop 561-6139
City Park 561-6300
Junior 561-6305
Miss D H H 561-6200
Pontchartrain 561-6218
Petite 561-6208
St Charles 561-6303
Today's Women 561-6307
Updated 561-6573
Young Junior 561-6306
Stationery 561-6311
Suits & Coats-Women's 561-6168
Telephone Shopping Service 561-6714
Toys 561-6313
Travel Bureau 561-6314
Umbrellas 561-6228
Wallets—
Ladies 561-6230
Men's 561-6260
Wine & Liquor 561-6211
Service Departments—
Adjustments Bureau 561-6666
Appliance-Small Electric Service 561-6526
Collection 734-3404
Contract Interiors 561-6518
Credit Collection 734-3404
Credit Department 561-6666
Delivery 734-3437
Employee Welfare 561-6652
Employment Office 561-6209
Fashion Coordinator 561-6496
Fashion Coordinator-Youth 561-6514
Hearing Aids 561-6232
Home Planning Center 561-6520
Interiors-Residential 561-6518
Lay-Away Cashier 561-6227
Mail Order 561-6714
Nightwatchman 561-6576
Opera Guild 561-6271
Optical 561-6269
Parking Complex 561-6575
Picture Frame Work 561-6332
Rug Cleaning 734-3415
Telephone Shopping Service 561-6714
Ticket Office 561-6295
Travel Bureau 561-6314
Wedding Gift Service 561-6317
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For Departments Not Listed In The Lake Forest Shopping Center Dial 241-7711
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Lake Forest 241-7711
Accessories—
Ladies 245-6128
Men's 245-6260
Junior 245-6224
Appliance—
Major 245-6125
Small 245-6235
Bath Shop 245-6162
Books 245-6299
Boys—
Sizes 8 To 12 245-6135
Sizes 14 To 20 245-6136
Bridal Registry 245-6163
Candy 245-6143
Car Care Center 245-6148
China 245-6158
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China-Glass & Gifts 245-6158
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Coats-Ladies 245-6207
Cosmetics 241-7711
Draperies 245-6194
Dresses—
City Park 245-6207
Career 245-6207
Daytime 245-6207
Esplanade 245-6207
Miss D H H 245-6208
Designer 245-6208
Junior 245-6231
Today's Woman 245-6208
Petite 245-6297
Factory 245-6231
Foundations 245-6213
Furs 245-6208
Furniture 245-6240
Infants Furniture 245-6240
Gifts 245-6219
Girls—
Sizes 1-3 & 2-4 245-6240
Sizes 4 To 6x 245-6220
Sizes 7 To 14 245-6136
Accessories 245-6221
Gloves 245-6230
Gourmet 245-6143
Hair Salon 245-6131
Handbags 245-6230
Hat Bar 245-6265
Hosiery 245-6142
Housewares 245-6235
Infants 245-6240
Jarman 245-6288
Jewelry—
Costume 245-6243
Fine 245-6242
Watches 245-6244
Lamps & Shades 245-6246
Linen—
Bed 245-6249
Table 245-6250
Lingerie—
Foundations 245-6254
Sleepwear 245-6213
Luggage 245-6255
Major Appliance 245-6125
Maternity Shop 245-6207
Men's Clothing—
Suits 245-6259
Furnishings 245-6260
Sportswear 245-6263
Pants 245-6263
Millinery 245-6265
Mustang Shop 245-6210
Photo Studio 245-6127
Pictures-Frames 245-6246
Robes-Ladies 245-6213
Rugs 245-6215
Shoe Repair 245-6285
Shoes—
Children 245-6287
Jarman 245-6288
Footlight 245-6290
Famolare 245-6225
Men's 245-6289
Woman's Better 245-6291
City Park 245-6291
Junior 245-6225
Red Cross 245-6290
Silverware 245-6159
Sound Center 245-6124
Sporting Goods 245-6299
Sportswear—
Pontchartrain 245-6274
City Park 245-6274
Cache 245-6270
Miss D H H 245-6274
Junior 245-6224
Young Junior 245-6224
Updated 245-6137
St Charles 245-6272
Today's Woman 245-6271
Stationery—
Cards 245-6134
Mail-Cards 245-6123
Subteen 245-6136
Suits & Coats-Ladies 245-6207
Toys 245-6299
Service Departments—
Alterations 245-6116
Car Care Center 245-6147
Cashier 245-6190
Credit 245-6181
Delivery 734-3437
Employment Office 245-6209

Continued On Next Column

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Continued From Last Column

HOLMES D H CO LTD—
LAKE FOREST SHOPPING CENTER—
Service Departments—
Gift Wrap 245-6145
Monogram 245-6116
Personnel 245-6209
Photo Studio 245-6127
Shoe Repair 245-6285
Shopping Service 561-6714
Ticket Center 561-6295
Travel Bureau 245-6152
NOTE: You May Dial Direct To The Desired Departments Listed Below
For Departments Not Listed In The Lakeside Shopping Center Dial 831-6111
LAKESIDE SHOPPING CENTER—
Lakeside 831-6111
Appliances—
Major 831-6122
Small Electric 831-6235
Bath Shop 831-6130
Blouses-City Park 831-6300
Books 831-6134
Boys Clothing—
Sizes 4 To 7 831-6136
Sizes 14 To 20 831-6318
Bridal Salon 831-6138
Bridal Registry 831-6162
Candle Shop 831-6219
Candy 831-6143
Candy 831-6144
Car Care Center
Lakeside Shopping Center 831-6147
Cards-Greeting Card Counter 831-6257
Children Accessories 831-6191
China & Crystal 831-6162
Coats-Ladies 831-6214
Cosmetics 831-6111
Cosmetics-Men's 831-6178
Draperies 831-6194
Dresses—
City Park 831-6201
Daytime 831-6201
Designer Shop 831-6396
Esplanade 831-6201
Junior 831-6202
Miss D H H 831-6201
Women's World 831-6201
Factory-Young Men's 831-6210
Fashions Accessories 831-6228
Furniture—
Bedding 831-6215
Infants 831-6218
Outdoor 831-6215
Furs 831-6214
Gifts 831-6219
Girls Clothing—
Sizes 3 To 6x 831-6221
Sizes 7 To 14 831-6275
Gloves 831-6230
Gourmet 831-6128
Hair Salon 831-6131
Handbags 831-6230
Hearing Aids 831-6232
Hosiery 831-6311
Housewares 831-6235
Infants 831-6218
Jewelry—
Costume 831-6243
Fine 831-6244
Lamps-Shades 831-6246
Linen—
Bath 831-6130
Other 831-6249
Table 831-6130
Lingerie 831-6253
Luggage 831-6255
Men's Clothing—
Suits & Coats 831-6264
Furnishings 831-6197
Pants 831-6259
Sportswear 831-6381
Millinery & Wigs 831-6265
Optical 831-6269
Photo Studio 831-6276
Pictures 831-6246
Radios-Records 831-6278
Restaurant 831-6140
Rugs 831-6281
Sewing Machines 831-6283
Shoes—
Junior 831-6291
Children 831-6287
City Park 831-6292
Footlight-Mall 831-6290
Men's 831-6289
Stride Rite-Mall 831-6288
Women's 831-6291
Repair 831-6285

Continued On Next Column

Continued From Last Column

HOLMES D H CO LTD—
LAKESIDE SHOPPING CENTER—
Silverware 831-6163
Sound Center 831-6278
Sporting Goods 831-6310
Sportswear—
City Park 831-6300
Miss D H H 831-6145
Junior 831-6223
Pontchartrain 831-6307
Stationery 831-6257
Suits & Coats Ladies 831-6214
Toddlers 831-6240
Toys 831-6313
TRAVEL BUREAU 831-6314
Umbrellas 831-6228
Wallets—
Ladies 831-6230
Men's 831-6197
Wigs 831-6265
Wedding & Copy Photography 831-6359
Service Departments—
Alterations—
Ladies 831-6335
Men's 831-6335
Appliances Small Electric Service 831-6235
Collection-Elmwood 734-3404
Credit Office 831-6182
Delivery-Elmwood 734-3437
Employment Office 831-6209
Furniture-Adjustment Elmwood 734-3465
Hearing Aids 831-6232
Lay-Away Cashier 831-6184
Optical 831-6269
Shoe Repair 831-6285
Shopping Service 561-6714
Ticket Office 561-6295
Travel Bureau 831-6314
Warehouse Store Elmwood 734-3444
China & Crystal 831-6162
Clock Shop 831-6246
Coats-Ladies 831-6214
NOTE: You May Dial Direct To The Desired Departments Listed Below
For Departments Not Listed In The Oakwood Shopping Center Dial 362-4800
OAKWOOD SHOPPING CENTER—
Oakwood 362-4800
Accessories—
Men's 361-7264
Junior 361-7226
Ladies 361-7230
Appliance—
Major 361-7125
Small Electric 361-7236
Bath Shop 361-7235
Books 361-7122
Boys—
Sizes 8 To 12 361-7135
Sizes 14 To 20 361-7139
Bridal Registry 361-7158
Bridal Salon 361-7163
Candy 361-7143
Car Care Center 361-7147
China 361-7158
Chin -Glass & Gifts 361-7158
Clock Shop 361-7246
Coats-Ladies 361-7207
Cosmetics 362-4800
Draperies 361-7194
Dresses—
City Park 361-7206
Career 361-7206
Daytime 361-7206
Esplanade 361-7207
Miss D H H 361-7207
Designer 361-7207
Junior 361-7279
Today's Woman 361-7208
Petite 361-7207
Factory 361-7210
Foundations 361-7254
Furs 361-7207
Furniture 361-7215
Infants Furniture 361-7241
Gifts 361-7129
Girls—
Sizes 1-3 & 2-4 361-7240
Sizes 7 To 14 361-7136
Accessories 361-7221
Gloves 361-7230
Gourmet 361-7143
Hair Salon 361-7131
Handbags 361-7230
Hat Bar 361-7265
Hosiery 361-7227
Housewares 361-7236

Continued On Next Column

Continued From Last Column

HOLMES D H CO LTD—
OAKWOOD SHOPPING CENTER—
Infants 361-7240
Jarman Shoes 361-7289
Jewelry—
Costume 361-7243
Fine 361-7242
Watches 361-7244
Lamps & Shades 361-7246
Linen—
Bed 361-7249
Table 361-7235
Lingerie—
Foundations 361-7213
Under Fashion 361-7254
Sleepwear 361-7254
Luggage 361-7107
Major Appliance 361-7125
Maternity Shop 361-7207
Men's Clothing—
Suits 361-7259
Furnishings 361-7260
Sportswear 361-7262
Pants 361-7263
Millinery 361-7265
Motorvations 361-7135
Mustang Shop 361-7211
Photo Studio 361-7127
Pictures-Frames 361-7246
Robes-Ladies 361-7213
Shoes—
Children 361-7287
Jarman 361-7289
Footlight 361-7291
Famolare 361-7291
Men's 361-7289
Women's Better 361-7291
City Park 361-7291
Junior 361-7291
Red Cross 361-7290
Silverware 361-7160
Sound Center 361-7124
Sporting Goods 361-7255
Sportswear—
Pontchartrain 361-7271
City Park 361-7272
Cache 361-7271
Miss D H H 361-7271
Junior 361-7224
Young Junior 361-7226
Updated 361-7271
St Charles 361-7272
Today's Woman 361-7202
Stationery—
Cards 361-7232
Cards 361-7233
Mail Cards 361-7119
Subteen 361-7136
Suits & Coats-Ladies 361-7207
Toys 361-7298
Service Departments—
Alterations 361-7116
Car Care Center 361-7147
Cashier 361-7190
Credit 361-7181
Delivery 734-3437
Employment Office 361-7209
Giftwrap 361-7145
Monograms 361-7116
Personnel 361-7209
Photo Studio 361-7127
Shopping Service 561-6714
Ticket Center 561-6295
Travel Bureau 361-7152
Uptown Square Store—
7x Broadway 861-8141
Louisiana World Fair Store 569-5040
Lake Forest Store—
Cards 241-6060
Photo Studio 246-8587
Travel Bureau 241-8350
Car Care Centers—
Lakeside Shopping Center 837-7226
Lake Forest Shopping Center 241-7500
Oakwood Shopping Center Gretna 366-4371
224 N Rampart 523-7203
4126 Chef Menteur Hwy 947-2184
Rug Cleaning 900 Distributors Row Jefferson 733-0326

Holmes D H Inc 900 Distributors Row 733-7454
Holmes D H Optical Dept
Oakwood Shopping Ctr Gretna 362-4811
Holmes D H Portrait Gallery
Oakwood Shopping Center 368-5245

HOLMES D H TRAVEL BUREAU—

TRAVEL BUREAU-LAKE FOREST
Lake Forest Shopping Center 245-6152

Continued On Next Page

Continued From Last Page

HOLMES D N TRAVEL BUREAU—
TRAVEL BUREAU-OAKWOOD
Oakwood Shopping Center Gretna 368-8827
TRAVEL BUREAU-CANAL ST
819 Canal 522-7941
Travel Bureau-Lakeside
Lakeside Shopping Center Metairie 831-6314

HOLMES FIRE & SAFETY
COMMODITIES 7620 Townsend Pl 246-1927
Holmes Floyd J 3232 Metairie Rd Metairie 831-1955
Holmes Hampton Rev
217 Westwego Av Bridge City 436-4282
Holmes House Apts 103 Amapola Cir Gretna 362-6379
Holmes James MD 1415 Tulane Av 589-5821
Holmes James F atty American Bank Bldg 561-5700
Holmes James R atty
First National Bank Of Commerce Bldg 568-1320
Res 3030 Bayou 821-0696
Holmes John A Dr 301 Hector Av Metairie 834-7205
Holmes John T atty 3637 Canal 486-5426
Holmes Mark Snyder atty 755 Magazine 581-5141
Res 3000 St Charles Av 897-6694
Holmes Michael R atty 405 Amelia Gretna 361-1736
Holmes Rug Cleaning 900 Destrehan Row 734-3418
Holmes Seafood Market—
92 Holmes Blvd Gretna 362-9378
92 Holmes Blvd Gretna 362-4646
Holmes Steven P 4722 Earhart Blvd 827-0033
Holmes Willard P ofc 4722 Earhart Blvd 827-0033
Res 1314 Lakeshore Dr Metairie 833-1452
Holmes William Rev 1708 Buccola Av Marrero 341-1910
Holmes Wrecker Service 244-1414
Holmquist Nelson MD ofc 1901 Perdido St 568-6065
Res 4720 Owens Blvd 283-2492
Holoway Michael E atty 643 Magazine 586-1200
Holstein Home Furnishing Inc
5648 Jefferson Hwy Jefferson 733-8076
HOLSUM BAKERIES INC 4700 Howard Av 486-5563
Holsum Computer Services 4730 Dixon 488-2628
Holt Cemetery 527 City Park Av 482-0662
Holt J E Turner ins
401 Veterans Memorial Blvd Metairie 834-8940
Res 6209 Gillen Metairie 887-1484
Children's Telephone
6209 Gillen Metairie 888-5406

HOLT PLUMBING & HEATING 827 Nunez 366-3501

HOLT RALPH S TESTING LAB INC
416 Girod 523-7844
Holt Sally Dr 7263 Cuipepper Dr 244-6975
Holten Thomas G Dr dntst
Maison Blanche Bldg 523-4186
Holten Thomas G Dr
291 Walker Rd River Ridge 737-0586
Holton Anne Baudino atty 755 Magazine 581-5141
Holton William A Jr ofc One Shell Square 561-5600
Holtzman Alan Mck Dr Ochsner Clinic 838-4000
Res 612 Colony Rd Metairie 733-1043
Holtzman David MD 2415 Tulane Av 588-5821
Holwadel Russel atty Texaco Center 566-1311
Holy Cross Fathers—
Provincial House 1828 S Carrollton Av 861-3643
Sacred Heart Church 139 S Lopez 827-1481
Holy Cross Lutheran Church
6154 Press Dr 288-3437
Holy Cross School—
Main Ofc 4950 Dauphine 942-3100
Admissions Ofc 942-3157
Bengal Band Hall 942-3126
High School Band Rm 942-3124
Middle School Ofc 942-3130
Principals Ofc 942-3100
Development & Alumni Ofc 942-3156
Athletic Dept 942-3129
Cafeteria 942-3162
Brothers Residence 942-3142
Athletic Dept 942-3122
Business Ofc 942-3115
Holy Cross Sisters 562 Focis Metairie 838-9503
Holy Faith Temple Church Of God In
Christ 2138 4th 897-9940
Holy Family Church-Rectory
170 Lakewood Dr Luling La— Kenner Tel No- -469-7769
Holy Ghost Church—
Rectory 2015 Louisiana Av 891-3172
School 2035 Toledano 899-6782
Convent 3325 Dauphine 897-2191
Cafeteria 2035 Toledano 899-6915
Parish Center—
3319 Dauphine 895-8129
Holy Ghost Parish Federal Credit
Union 2017 La Av 895-0242
Holy Guardian Angels Church—
AngelSquare 1701 Bridge City Av Bridge City— 436-9376
908 Wiegand Dr Bridge City 436-4712
Holy Hill Baptist Church
1409 Manhattan Blvd Harvey 362-4481
Holy Name Of Jesus Church
6226 St Charles Av 895-8388
Holy Name Of Jesus School—
6325 Cromwell Pl 861-1466
Faculty Res 6628 Freret 899-8953
Holy Name Of Mary Church 500 Eliza 362-5511
Holy Name Of Mary School 502 Olivier 361-4884
Holy Orthodox Catholic Church
American Synod 1426 Magazine 525-9446
Holy Redeemer School—
Ofc 1941 Dauphine 943-1830
Cafeteria 1941 Dauphine 945-4659
Holy St Matthews Baptist Church
1300 Eagle 866-2369
Holy Spirit Church 6201 Stratford Pl 394-5492
Holy Temple Church Of God In
Christ 1818 Conti 525-8583
Pastor's Res 1818 Conti 524-5811
Holy Trinity Catholic Church
721 St Ferdinand 949-4413
Holy Trinity Christian Baptist
Church ofc 1727 Erie 368-4242
HOLZER SHEET METAL WORKS INC
321 Burgundy 525-8134
HOMACO INTERNATIONAL INC
Simmons Houma La
NEW ORLEANS TEL NO- -524-5428
Home Appliance Service 2209 Magazine 523-3978
Home Away From Home Day Care
Center 1743 Marigny 947-6823

HOME BEVERAGE SERVICE INC
See Our Ad At Beverages-Home Delivery In The New Orleans Yellow Pages
712 Frenchmen 947-5554

HOME BUILDERS ASSOC OF GREATER
NEW ORLEANS 2424 N Arnoult Rd Metairie 837-2700
Home Care Program Of Tulane
University Hospital 1415 Tulane Av 587-2190

HOME DEPOT THE—
62 Westbank Expwy 362-2361
1000 S CLEARVIEW PKWY
JEFFERSON 734-1601

Home Economics Agts—
Jefferson Parish 1825 Bonne Ann Dr Marrero— 341-7271
St Bernard Parish Courthouse
Chalmette La 279-9402
HOME EFFICIENCY PRODUCTS 340-2952
Home Emergency Living Program
7100 St Charles Av 866-9691
Home Finance 4899 Westbank Expwy Marrero 340-6966
HOME FINDERS INTERNATIONAL
832 St Louis 525-7153
Home Finders Of Louisiana Inc
823 St Louis 522-0155
HOME FURNISHING STORE THE
1600 Prytania 566-1707
Home Guard Home Improvements
Inc 3456 Cleary Av Metairie 887-8081

HOME HEALTH SERVICES OF LA INC—
Phone Answered 24 Hours
Westbank Ofc 361-3969
2001 Canal 581-6768

Home Improvements Specialist Co
1324 David Dr Metairie 455-4456
Home Indemnity Co ins
3510 N Causeway Blvd Metairie 837-9280

HOME INSPECTION SERVICES
Canal Place One 525-2336

Home Insurance Co The
3510 N Causeway Blvd Metairie 837-9280
Home Inventory Service
505 Bellemeade Blvd Gretna 392-6664
Home Land Realty Co
3720 Bunker Hill Dr Metairie 455-4600
HOME LIFE INSURANCE CO OF NEW
YORK—
415 LAFAYETTE 581-9903
Group Dept 1515 Poydras 566-6011
Home Loan & Thrift Corp
703 N Belle Chasse Hwy Belle Chasse 394-1270
Home Made Makings & Other
Things 4436 Transcontinental Dr Metairie 454-8313
Home Mission Baptist Church
4201 Erato 822-7330
Home Nursing Service 941 Mouton 282-8111
Home Owner Magazine 805 Marengo 899-8801
Home Plate Inn 4833 Tulane Av 488-9113
HOME PROTECTION OF NEW
ORLEANS INC—
Main Office 3456 Cleary Av Metairie 455-7218
Shop 120 Magazine Chalmette 277-9322
Home Protection Patrol Inc 737-5862
Home Protection System Inc 393-9607
Home Protectors Inc 2612 4th Harvey 368-0064
Home Realty Co 3420 Delaware Av Kenner 464-1590

HOME RECOVERY SERVICES
4500 11th Marrero 347-5511

Home Renovations 853 Mystic Av Gretna 393-7295

HOME SAVINGS & LOAN ASSN
3625 Canal 486-7791

Home Security & Iron Works
1301 S Salcedo 822-0813
Home Services contrs 734 Jefferson Av 897-2081
Home Sweet Home Motel
4231 Airline Hwy Metairie 835-5946
Home Town Super Market—
6850 Westbank Expwy Marrero 347-2026
Home Transportation Co Inc
Hwy 190 E Slidell La— New Orleans Tel No- -525-2038
Home Video Entertainment
3600 Williams Blvd Kenner 443-1127
Home Video Movies Co 3351 Kabel Dr 391-0014
Home Water Distillers Inc 486-8423
Homebright Decorating &
Remodeling 334 Hord Jefferson 733-9359
Homecraft Land Development Inc
1919 Veterans Memorial Blvd Kenner 466-5723
Homedale Beaute Shoppe
619 Homedale Av 488-2198
Homedale Inn 618 Homedale Av 488-9130
Homemaker's Furniture Co
613 Clearview Pkwy Metairie 888-5575
Homemakers Upjohn
See Upjohn HealthCare Services
Homer's Lounge 2600 St Peter 822-9605
Homes Octavia 8137 Oleander 482-7861
HOMES PRINTING CO 2637 Gravier 822-0955
Homes Recovery Services
4500 11th Marrero 347-5511
Homeseekers Savings & Loan Assn
See South Savings & Loan Assn
Homet Aluminum Co
2735 Virginia Av Kenner 467-4607
Homet Co 2735 Virginia Av Kenner 467-4607
Homet Patio Co Brown Rd
Ponchatoula La ..... New Orleans Tel No- -525-2805
HOMET PATIO CO 2735 Virginia Av Kenner 467-4607
Hometown Electric Service
424 Oak Marrero 341-5890
Homeworks Inc
Uptown Square Shopping Center 866-6375
Homrighausen Edgar Rev 2021 S Dupre 822-0771
Honda Country 2428 Williams Blvd Kenner 466-3656
HONDA EAST motrcycls
7130 St Claude Av Arabi 279-5574

HONDA-GARRETT HONDA motrcycls
10150 I-10 Service Rd 246-8000

HONDA-GARRETT HONDA COUNTRY
2428 Williams Blvd Kenner 466-3654

HONDA WEST
1208 Lafayette Gretna 362-5200

HONDURAS PETROLEUM CO INC
2531 S Broad 822-5230
Honduras SAHSA Airlines—
Freight
New Orleans International Airport Moisant Field
Kenner 464-9061
New Orleans International Airport Moisant Field
Kenner 464-1212
Honey Baked Ham Co—
For Gift Shipping Toll Free Dial '1'
& Then 800 343-4042
HONEY BAKED HAM CO
3120 Severn Av Metairie 885-8368
HONEY BEE NURSERY
817 Houma Blvd Metairie 835-3544
Honey Hut 9605 Jefferson Hwy 733-9367
Honeyhurst Restaurant 1401 S Rampart 523-9457
Honey's Place Restaurant
3106 Loyola Dr Kenner 468-6367
Honey's Pool Parlor
95 Westbank Expwy Gretna 361-9654
Honeywell Bldg Services
3621 Riverside Dr Metairie 454-7231
HONEYWELL INC—
Sales & Service—
Main Office 6620 Riverside Dr Metairie 454-6200
Administration 6620 Riverside Dr Metairie - 454-7210
Building Services Division Sales
6620 Riverside Dr Metairie 454-7220
Building Services Division Parts
6620 Riverside Dr Metairie 454-7230
Commercial Sales
6620 Riverside Dr Metairie 454-7240
Commercial Construction
Division Service
6620 Riverside Dr Metairie 454-7250
Data Processing Operations
6620 Riverside Dr Metairie 454-7260
Data Processing Operations
6620 Riverside Dr Metairie 454-7270
Federal System Operations
6620 Riverside Dr Metairie 454-7280
Field Engineering Division
6620 Riverside Dr Metairie 454-7290
Process Control Division
6620 Riverside Dr Metairie 454-7300
Process Control Division
6620 Riverside Dr Metairie 454-7310
Residential Division
6620 Riverside Dr Metairie 454-7320
Electronic For Medicine—
6620 Riverside Dr Metairie 888-2857
HONEYWELL PROCESS CONTROL
DIV-INDUSTRIAL SERVICE
CENTER 9213 Interline Baton Rouge La
NEW ORLEANS TEL NO- -525-2517
HONEYWELL PROTECTION
SERVICES—
Central Office 421 N Carrollton Av 482-5721
Service 421 N Carrollton Av 482-5721
Sales & Accounting 421 N Carrollton Av 486-7761
Hong Kong Bathhouse & Oriental
Massage 3029 Esplanade Av Metairie 888-6713
Hong Kong Gift Shop 1717 Canal 522-6579
Hong Kong Islands Line America $$
TM Bldg 534-7554
Hong Kong Market
2311 Veterans Memorial Blvd Metairie 833-1452
Hong Kong Mohawk Custom
Tailors 106 Royal 524-3529
Hong Kong Restaurant—
7400 Lakeshore Dr 282-1511
7400 Lakeshore Dr 282-9160
Hong Kong Restaurant
520 E St Bernard Hwy Chalmette 279-8289
HONG KONG TRADE DEVELOPMENT
COUNCIL
World Trade Center Dallas Tx 214 748-8168
Honore Lawless contr 2337 Annette 944-4033
Res 2337 Annette 943-1437
Hontas Mark Dr MD
4431 Veterans Memorial Blvd Metairie 454-3434
Hood Motor Co
501 S First Amite La— New Orleans Tel No- -523-9486
Hoods Auto Repair 2620 Buffon Chalmette 279-5322
Hood's Inc 4520 Williams Blvd 466-2217
Hook & Ladder Lounge 5746 Hayne Blvd 241-9849
Hook Michael S 2332 N Arnoult Rd Metairie 837-4555
Hooker Charles 1001 Howard Av 528-3875
Hooker Jim ofc 4405 Chastant Metairie 455-7779
Hooker Reba Real Estate 1840 Benson 944-5499

HOOLEY INC
4401 Bienville Av 482-3619

Hooper Genevieve Wirth Rev
1228 Moss 482-4343
Hooper-Holmes Inc ofc
3131 N I-10 Service Rd E Metairie 837-5366
Hooper N Gorman CPA ofc
2852 Carey Slidell La— New Orleans Tel No- -861-0017
HOOPER'S STOVE WORKS 1108 Bienville 891-8839
Hooten-Sprinkle Co Inc
648 Hickory Av Harahan 737-8834
HOOTER O J FURNITURE CO INC
1936 Magazine 822-8167
Hoover Bendel C Dr DPM
1799 Stumpf Blvd Gretna 362-3738

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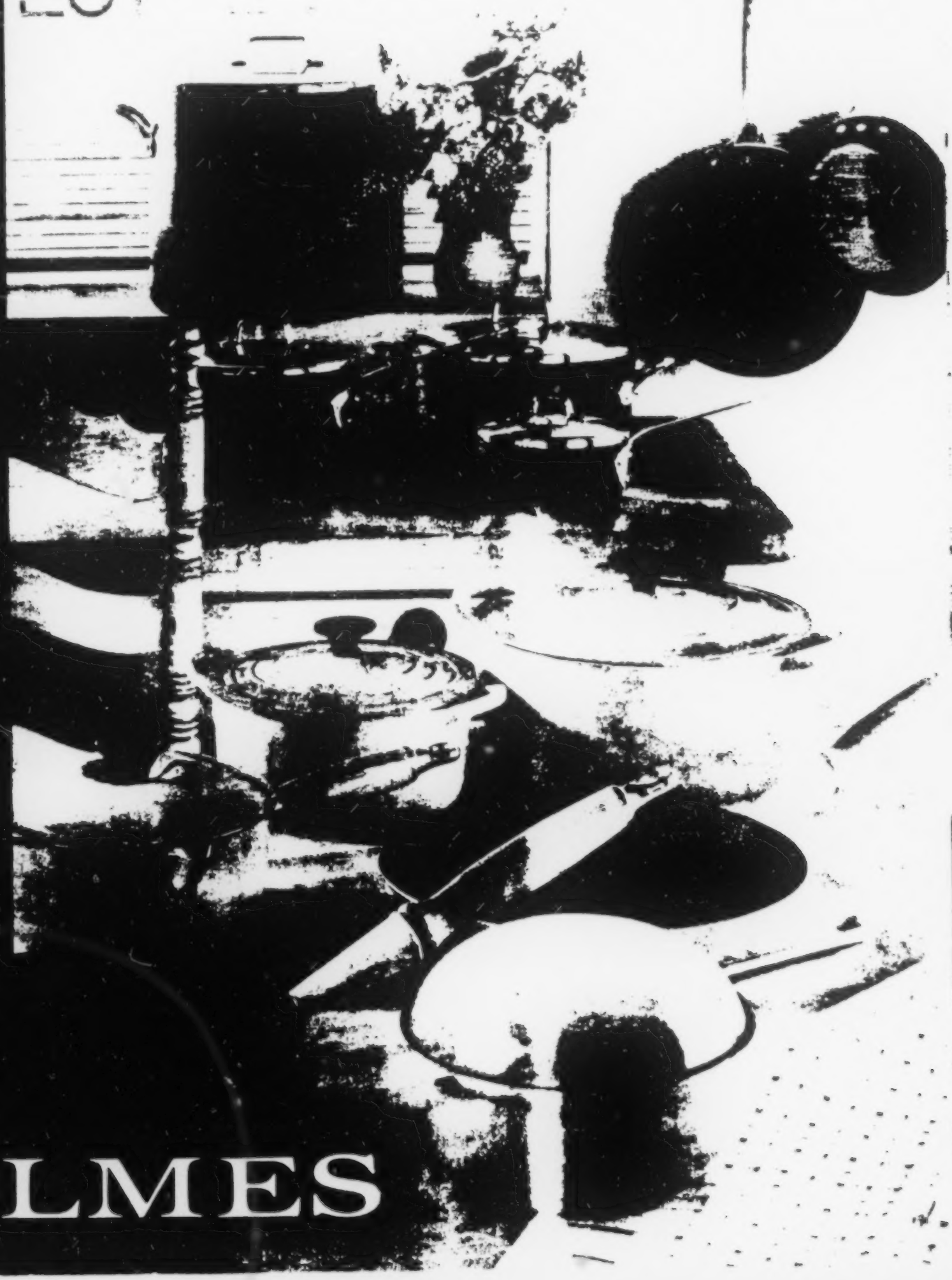
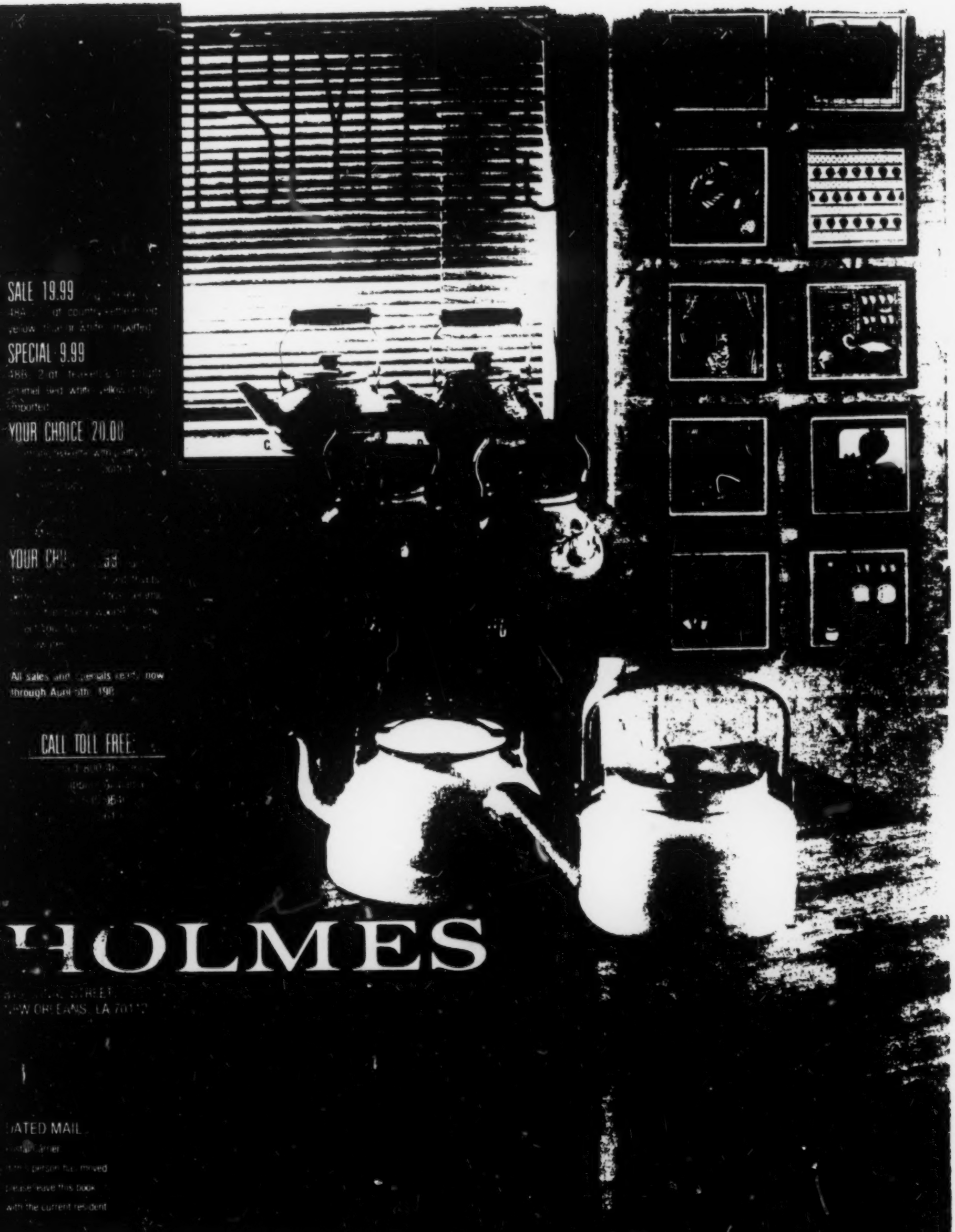
PLAINTIFF'S EXHIBIT
6

ESTYLE

WE HAVE THE INGREDIENTS FOR A BEAUTIFUL SPRING AT SAVING PRICES. LOOK FOR OUR RECIPES INSIDE. FOR COVER STORY, SEE PAGE 2.



HOLMES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with the current resident

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS

Testimony and notes of evidence taken in the above-entitled and numbered cause in Open Court before the HONORABLE REVIUS O. ORTIQUE, Judge, presiding on Tuesday, the 19th day of March, 1985.

APPEARANCES:

ANDREW RINKER, JR., ESQUIRE
Representing the Defendant

ROBERT PUGH, ESQUIRE
Representing the Plaintiff

WILLIAM GRACE, ESQUIRE
Representing the Defendant

* * * *

[24] MR. PUGH: Yes, may we call to the stand Mr. Buddy Leach.

* * * *

CLAUDE LEACH, Leesville, Louisiana, 71446; after having first been duly sworn did testify as follows:

* * * *

DIRECT EXAMINATION

EXAMINATION BY MR. PUGH:

Q Are you an attorney and officer of the Court?
A That's correct.

Q Do you serve in any elective capacity?

A At the present time I'm serving as State Representative in the 30th Representative District State of Louisiana Legislature.

Q Do you hold any position with the committee in connection with that?

A I do, I serve as chairman of the House Ways and Means Committee, a position I've held for about eight years.

[25] Q Have you ever been elected to any other offices besides State office?

A I've served a term in United States Congress.

Q All right, sir, as the chairman of the House Ways and Means Committee of the State of Louisiana, is that the Committee where tax legislation initially is considered?

A That is correct, under the constitution of our State review which originates in the House of Representative and Committee Submatter is the Ways and Means Committee.

Q All right, sir, in that connection, I would like to ask whether or not you have any personal knowledge as to services which might be rendered by the State of Louisiana through its taxes to a company called D.H. Holmes or its employees or customers?

MR. RINKER: Your Honor, we object to his [26] question. As we pointed out earlier, this matter is really without dispute. There is no doubt that the State of Louisiana provides numeral services including fire, police protection, sanitation, and all types of services.

THE COURT: Well, I'm not sure about that. I'm not sure that it does. That's for all of these services.

MR. RINKER: You're correct with respect to cities, there are government services that are provided. We don't dispute that.

THE COURT: We ought to have it in the record. Let's see what his witness says.

MR. PUGH: Thank you.

THE COURT: [27] The objection is overruled.

BY MR. PUGH:

Q Would you be kind—

A Yes, I will respond in this manner. The constitution of our State requires all revenues to flow through first the general bond redemption fund and all revenues collected by the State of Louisiana flow through this fund into the State general fund, from the State general fund and from the State's general funds are appropriations made annually. I have knowledge from my work in the State Legislature of the sums of money appropriated annually for various services. We have a uniqueness in Louisiana in that we use State general funds for local governmental purposes. Large amounts of money come into the Parish of Orleans as it does to other parishes also, of course, that would directly benefit the [28] customers and the employees of D.H. Holmes would be the minimum foundation formula funding public education.

This runs close to $100 million a year excluding many other amounts that the State appropriates directly to the Orleans Parish School Board. I'm familiar with the amount that we appropriated to the Orleans Municipal firemen to supplement their pay. This is over 4.8 million a year of municipal policemen in New Orleans which protects the property of D.H. Holmes as well as its customers.

The State of Louisiana supplements that salary, those salaries, I should say, the Sheriff's deputies, both criminal and civil, which serve both the customers as well as the business itself and protection as well as serving the legal papers and in attending to [29] those matters the State supplements the Deputy Sheriffs salaries. The State, of course, appropriates from its general funds to the mass transit systems of close to $5 million dollars a year which benefits the customers and their method of transportation,

as well as the employees of D.H. Holmes coming and going to the various locations.

The road funds this past year, I think the Parish of Orleans received around $2 million which goes for the streets in the City.

MR. RINKER: I'm going to object, we're talking about a tax period '80 and '81, and I would ask you to instruct the witness to direct his comments to expenditures made in New Orleans relative to those particular tax years.

[30] THE COURT: Well, as indicated before, I think we need to hear this testimony since counsel has indicated that it is part of the theory of his case. The Court knows there is a D.H. Holmes in Lafayette and there is a D.H. Holmes in, I think, there is one in Baton Rouge, and I would suspect that these figures are being offered as merely suggestive, not the total end of the point. You will have your opportunity to cross examine. We're going to overrule your objection. The objection is noted for the record and your objections are made continuing. You may proceed.

BY MR. PUGH:

Q If you will, Mr. Leach?

A The same service is rendered the [31] citizens who are both customers and employees of D.H. Holmes and I would think also, perhaps, stockholders of the corporate structure were rendered in '79, '80, as they are today. The amount differs on occasion, but the percentage remains fairly constant, particularly in the field as previously stated.

The minimal foundation for public education, fire protection, police protection, the Sheriff deputy, coroners, the uniqueness in New Orleans, the amount of money that the State pays for the assessors commission, which is not paid in other parishes, this allows the assessors to do their work, which, of course, renders revenues for the City to

operate on providing these other services, such as sewerage, et cetera. The State also provides funds that are [32] collected through taxation throughout the State for drainage in the City of New Orleans.

We provide funds for the Audubon Park Zoo. Most recently over $500,000, and through the years, including back into the 79, 80 percent. Appropriations were made for the Audubon Park Zoo for the enjoyment of citizens for the entire City, customers of D.H. Holmes as well as employees. I believe that we could go into the supplemental services on a parish level, if the record would like to reflect that. The State funds also provide pro rata shares of the District Attorney's office, your District Judges' offices, your various expenses of the judicial system, all supplemented from collections that go into the general fund and appropriate out to the [33] particular parishes.

Q You've spoke primarily of Orleans. You've used some generalities as indicated by the Court, the Court has taken notice of the fact that there is a D.H. Holmes in another city. He believes there is one in Baton Rouge, on the premises that those facts will be developed, what figures, not necessarily the same figures, but some figures be attributable to each of those other cities and parishes that the Court has mentioned and I now mention?

A In each case where there is a site of a D.H. Holmes within Louisiana, the figure would be comparable based on population figures with the exception of mass transit. Orleans receives a greater share of mass transit funds than the other parishes, but as far as your other cities, there would be comparable figures based on [34] population.

MR. PUGH: I tender this witness, your Honor.

CROSS EXAMINATION

BY MR. RINKER:

Q Representative Leach, you testified earlier that you had been a member of the Louisiana House of Representa-

tives or that you were currently, were you a member of the Louisiana House of Representatives in the year of 1979, '80 and '81?

A I was in that in 1979. I was not in '80-'81.

Q During that time, did you have an occasion to come across tax receipts or have first hand knowledge of income and disbursements made for these various areas that you described earlier in your testimony?

A Yes, on several occasions in 1979, particularly, I was serving as chairman of the Governor's Ad [35] Valorem Tax Commission Study as well as serving subcommittee in my own House Ways and Means committee and through studies conducted, I had first hand knowledge at that time of these various items that I have spoken of this morning.

Q By "ad valorem" you mean property tax?

A Correct.

Q Do you have any idea how much, in taxes, Holmes paid in the year 1979, '80 or '81?

A No, I do not think it's, first of all, the answer, no. Secondly, I do not think that would be information that would be public to begin with, sir, I have never tried to nor had reason to find out how much any taxpayer in our State pays.

Q Do you know how much of the expenditures were expended from its Holmes' customers and employees?

A I could not because I do not know [36] the number of customers, but I do know that D.H. Holmes supports throughout their, wherever they're located, by the population, and each person who would trade with D.H. Holmes has benefits through these services which we spoke of earlier.

Q To what extent are the benefits, in dollar amounts?

A You would have to take a per base percent. A homeowner would have benefited from lower insurance rates because of having adequate fire protection and not having to pay for this on ad valorem tax basis. D.H.

Holmes would have benefited directly from having adequate fire protection.

Q Does D.H. Holmes benefit any more than any other citizen or company or department store in the State?

A D.H. Holmes would benefit to the extent of its value, to the [37] extent of the property, the same as you would benefit or I would benefit.

Q Benefit to the value of its property?

A As far as the insurance value and the amount, it would benefit.

Q I'm talking about all the taxes, in general, that you described earlier, all the payments for services?

A There would be some that D.H. Holmes would benefit greater from and some perhaps not as great. But as far as the funds go, from mass transit, from moving customers in and out of the City, as far as the services and the bridges, the amount of money being spent there, in commercial enterprises, the larger the enterprise, the larger the benefit.

Q Does Holmes derive any special benefits beyond that in any other department store or any other company or wholesale or [38] retailer, for that matter?

A When you use the word "any other" I cannot answer that question.

Q I'll give you an example. The Gus Mayer's or Godchaux's or any other store, does D.H. Holmes derive any benefit which is not common to all of these other companies?

A The benefits are common if the company is in the same volume of business that D.H. Holmes is.

Q And you have testified earlier that the value of property is important and that's what the tax should be based on, is that correct?

A I did not testify to that. I testified a moment ago to the fact that you asked me about a specific savings and benefit and I mentioned that on your fire insurance, your insurance premiums are determined by your inven-

tory amount. And to that amount D.H. Holmes would [39] benefit by having lower insurance rates.

THE COURT: Just one minute. Let the witness complete his statement.

THE WITNESS: I did not testify or did not think I testified, do not recall testifying to the value of property for taxation purposes. I'll be glad to answer the question you had in that field.

THE COURT: Any other department stores with a similar situation, volume, property, or whatever, would be taxed in the same manner, you don't discriminate that?

THE WITNESS: That's correct.

THE COURT: All right.

BY MR. RINKER:

[40] Q With respect to these taxes and in particularly with respect to catalogs, what is the basis for the State imposing a tax on catalogs, particularly catalogs mailed from out of State directly to residents?

A In revised statute, I think, I believe you will find this, this would refer to our section, "use tax." The catalogs are property of D.H. Holmes. I assume in this case, since this case, since this is the case of D.H. Holmes, Holmes owns the catalogs. They pay to have them prepared and they use them to generate business from the mail order branch of their business, I assume. The taxes only use value of the catalogs. When you are unable to determine exactly the exact value, then you have to look to see what it costs to put that catalog together. This is on all catalogs used that I'm [41] familiar with that are prepared either in state or out of state to generate business within Louisiana.

Q At what point is that use tax imposed on the catalogs, at the point in which they're located out of state or at the point at which they come to rest in Louisiana?

A I cannot answer the question. I feel quite sure there are other witnesses from the Revenue Department

that could give you that detail on procedure of taxing. I do know it's a use value of taxes and I do know it would be on the value of the catalogs, the amount, quantity to D.H. Holmes to prepare these catalogs.

* * * *

[42] GEORGE SILBERNAGEL, 4110 Janet Avenue, Baton Rouge, Louisiana; after having first been duly sworn did testify as follows:

* * * *

DIRECT EXAMINATION

BY MR. PUGH:

Q Would you give your address, please?

A My name is George Silbernagel. I live at 4110 Janet Avenue, No. 2, in Baton Rouge.

Q Are you employed, sir?

A Yes, I am a legislative fiscal officer analyst with the Legislative Fiscal Office in Baton Rouge, Louisiana.

Q And is that for the State of Louisiana?

A That's for the State of Louisiana.

Q And how long have you been so employed?

[43] A Since September of 1982. I've been an analyst with the fiscal office.

Q What is your educational background?

A I have a B.A. and M.A. from the University of New Orleans and in addition to that, I had 15 or 20 hours of extra accounting degree work at LSU.

Q All right, sir, what are your duties with the Legislature?

A With the Legislature Fiscal Office, we have our primary responsibility providing fiscal and economic information based on the various appropriate bills every year, various legislature instruments that are introduced along with other specific requests made by legislators.

Q Did you have an occasion to prepare any type of survey or report relative to the services, finances, that

the State of Louisiana afforded to Orleans and Orleans Parish?

[44] A In September of 1982 there was a request from the Speaker of the House to furnish information regarding the distribution of funds to various local governmental units and it was requested by the fence speaker to separate funds, distribute to the City of New Orleans, from those funds distributed to the legislator of the State.

Q And did you prepare such a report?

A We prepared a report with regards to those funds.

Q Was that report either prepared by you or under your supervision?

A The request went to the legislature fiscal officer, Mark Grennan (spelled phonetically) who then requested that I and another analyst accumulate the data and put it into a form that would be released to the speaker of the house and member of the legislature. So, yes, I did prepare that report.

Q And did you accumulate analysis [45] from any other individual in connection with it?

A We spoke with several other analysts that work in the fiscal office in order to collect the data. I, myself, was involved in specific areas. Other analysts were involved in other areas of that report.

Q But, it was, the whole coordination of that was your responsibility?

A Yes, sir.

Q Can you recollection, from your own memory, items that were involved in that report?

A The report is many pages, several pages long. I can't recall the number, I can think very clearly about specific types of aid, specific program names in which funds were distributed to the local government. One of the areas was the Parish Transportation funds, which is a total sum of about $42 million that is distributed to [46] parish governing authorities. Also, the constitutionally mandated amount of $90 million is distributed

on a state-wide basis known as revenue sharing, and I believe in 1982-83, I can't recall those amounts, I believe that New Orleans received about $12 million in revenue sharing money and about 2.5 and 2.7 million in parish transportation fund money.

Those are just some of the areas that we collected data for.

Q Do you have that report with you or a copy of that report?

A I do not have that report with me.

Q May I approach the witness?

THE COURT: Of course.

BY MR. PUGH:

Q Do you have another copy in your file?

A I do.

Q May we have a 30 second recess where he can get another copy and I can give the copy to [47] opposing counsel?

MR. RINKER: I would like to object to this whole line of testimony. One, there is no dispute that services are provided through money provided by the State. And second, the evidence is irrelevant because there is no foundation to establish that this deals with figures of expenditures during 1979, 1980, 1981. Third, this evidence is cumulative and most of it's been testified to in general concept of the witness.

MR. PUGH: My response is, first of all, given the opportunity, I will inquire of the witness as to whether or not the figure is comparable from '79, '78 and '80. And in addition [48] to that, as the court is aware, I do want to make a showing for the record of the services that are performed from tax funds for this area.

THE COURT: All right. The only part of his objection that I'm a little concerned about and that is the objection based on the information being cumulative. We don't need to have every witness to go through in detail every point. I'm going to allow you to continue the testi-

mony because I realize that you do wish to make a record and I do think that it is relevant in a general way, and maybe an Appellate Court would want to have more specifics and rather than have it come back to us and then send it back [49] up to them, we will put in as much as we deem appropriate, but cautioning you not to be unaware of the rules against cumulation of material.

MR. PUGH: It may well be that the best way to get to it would be to introduce, let them identify the report and introduce it in the record based on the testimony that's already given that was done by him under his supervision and at least that will save the record some time.

THE COURT: The objection is overruled, except, the court does recognize at least one portion of your opposition that may be valid, and we'll rule again at that time. The objection is [50] noted for the record.

MR. RINKER: Thank you, your Honor.

BY MR. PUGH:

Q I have handed counsel a copy of what the gentleman has testified to. May I ask you one or two questions?

A Yes.

Q First, from experience in that office, can you tell me whether or not that the figures reflected there are approximate, exact, close comparable to similar figures for the years of '78, '79, '80 and '81?

A Sir, there would be a difference between the figures that you have in this report and the years '79, '80 and '81, to the extent of the new program being instituted. I can draw your attention on Table 2, the second page, if one wanted to back out at that number, that would not have been included [51] in '79 or '80, to the best of my knowledge. One of the only places you would be able to back out of a number would be mass transit, which was not in existence in 1979-80.

Q Was it in existence in '81?

A It was in existence in '80-81.

Q Thank you. Do you see any other indications—

A No, the only other—basically the only difference would be that the amount would be slightly lower in '79-80 then increasing again in '80-81 and then increasing in '81-'82, basically to reflect the demand for services by the local governmental units in making these demands on the State for additional State aid.

Q On behalf of the plaintiff, your Honor, I would like to approach the witness and take the document, mark it and offer, introduce it into evidence.

THE COURT: [52] All right, fine. Any objections other than the one that was stated previously?

MR. RINKER: No, your Honor, other than the fact that a lot of these figures may be based on hearsay and we're waiting to see if the witness will testify to his personal knowledge as to all of these pieces of information.

THE COURT: Very well. The witness has declared that the report was either prepared by him or by his supervisor and we think that that will take care of the hearsay rule, but obviously, when you have him on cross examination, you will have the opportunity to question him. The Court is ruling, however, that [53] the document is admissible into evidence and the Court will give it such weight as it deserves. Proceed.

MR. PUGH: On behalf of this witness and subject to the ruling of the Court, I would like to file, offer this into evidence, this documentation as P-1.

THE COURT: All right, it is admitted. Hold on to it until such time as you're ready to make your list and submit it.

MR. PUGH: Thank you, your Honor. I tender the witness.

CROSS EXAMINATION

* * * *

[55] EXAMINATION BY MR. RINKER:

Q Are you aware whether Homes makes any contributions in the form of various taxes, including sales, use, income, franchise, excise taxes payable to the State of Louisiana which funds internal use for the payment of some of these appropriations or expenditures in this State?

A D.H. Holmes would be liable for payment of any taxes in the form of sales tax and the like.

Q But, does D.H. Holmes in fact—

A They would pay the same taxes as any other business in the City would pay, both city taxes and [56] State taxes.

Q But, does D.H. Holmes pay such taxes?

A Yes.

Q Do you know how much D.H. Holmes pays in taxes?

A No, I do not.

* * * *

[78] ROY C. BRADLEY, 356 Summit Ridge, Baton Rouge, Louisiana 70815; after having first been duly sworn, did testify as follows:

* * * *

DIRECT EXAMINATION

* * * *

EXAMINATION BY MR. PUGH:

Q If we may, for the moment, turn to the catalog issue and I'll ask you first whether or not there is a tax placed upon a Louisiana based business printing catalogs in Louisiana?

[79] A Yes, sir.

Q Do you know whether or not the catalogs at issue here were printed in Louisiana?

A They were not.

Q Do you know where they were printed?

A I believe they were printed in New York State. I'm not absolutely sure, but that is my understanding.

Q Do you have personal knowledge what occurs to the catalogs once they are printed?

A Yes, sir, it's my understanding they were mailed to customers at D.H. Holmes Company within and without the State of Louisiana.

Q Sir, you said it's your understanding, you don't have any personal knowledge of that, is that correct?

A No, sir.

Q Is it these catalogs, is it your understanding that they have been mailed in Louisiana, is that the catalogs that are [80] referred to in the 15 day letter that proposed assessment?

A Yes, sir, with the exception of the ones that were mailed to out of state customers.

Q Hold on just a minute.

MR. GRACE: I just have an objection. I didn't see anywhere there is a reference in the proposed assessment to any catalogs.

EXAMINATION BY MR. PUGH:

Q You're absolutely correct, and I'll ask you whether or not the reference is in the response from Holmes to the proposed assessment?

A Yes.

[81] CROSS EXAMINATION

BY MR. GRACE:

Q Mr. Bradley, you did not participate in the assessment, is that correct?

A That's correct.

Q You did not look at any figure of Holmes, did you?

A That's correct, I did not.

Q You don't know what Holmes' total candy sales were for the month—for the year 1979, '80 or '81, do you?

A No, sir.

Q And you don't know the value of the [82] catalogs that Holmes had printed out of state and mailed from out of state in Louisiana, what the values of those catalogs were for the years?

A I do know from reading Mr. Falter's letter, in his letter I do have that in my possession, the total amount under the assessment for the audit period, but I did not develop any of these figures and did not participate personally in the audit.

* * * *

[109] Q Turning to the catalog issue, will you describe the incident of taxation of these catalogs?

A The instance of taxation would be under Provision RS 47302, a dealer who imports or causes to be imported tangible personal property into the State for use and distribution in the State.

Q What rights or powers over these catalogs does Holmes have when they enter the State of Louisiana?

[110] A They have the right of power to direct their distribution.

Q No, I'm talking about, is it your contention that when this enters the State, Holmes has the power to tell the mailing authorities, after they have been mailed, to deliver them to certain people?

A You said after?

Q After they have been deposited in the mail in New York by the printer in New York, is it your contention that Holmes exercises any incidents of ownership over those catalogs?

A Yes, sir.

Q What incidents of ownership does Holmes exercise over those catalogs after they have been deposited in the United States mail in the State of New Orleans?

A Well, they have caused those catalogs to be imported into the State for their use, for the furtherance of their [111] business and thereafter delivered to their customers.

Q What use is made of these catalogs by Holmes in Louisiana?

A They promote the sales of their articles.

Q Has the State done any study to determine whether or not Louisiana residents receive these catalogs, use these catalogs?

A Not that I'm aware of.

Q How has the State made any studies or made any determinations as to what use is made by Holmes of these catalogs?

A Yes, in viewing this examination, I feel like Holmes has ownership of the catalogs and cause them to be delivered in this State.

Q What facts do you have to support that, that is merely a contention, is it not?

A I view it as a matter of fact that they purchase catalogs and cause them to be imported in [112] the State. I don't see any dispute there.

Q Do you agree that these catalogs were printed out of State?

A Yes.

Q Do you agree that the catalogs were deposited by those printers into the United States mail out of State?

A Yes, sir.

Q Do you agree that after they are placed in the mail, Holmes has no control over those catalogs?

A That's correct, directing of the mail after that point, they don't.

Q Okay.

A But, if they're not delivered, they probably are returned to them. It would be the party whose return address is shown that would be responsible for them.

Q Do you know what sales were made as a consequence of these catalogs coming into the State of Louisiana?

A Not directly. I know that obviously [113] sales were made. The number of them, I do not know. I know that mail order business, for many businesses, are a significant part of the economy.

Q Do you know what percentage of Holmes' sales were made to Louisiana residents who may have received these catalogs?

A I do not.

Q Has your department made a study to make that determination?

A No, we have made studies as far as catalogs sales but not by individual companies.

Q So, I understand it then, that you have not performed any study to establish a link between the distribution of the catalogs and the amount of sales made by Holmes to these people?

A That's correct.

Q Do you know, can you recite to me one instance of a customer of Holmes who has received such a catalog and made a sale and [114] purchased something from Holmes? Can you give me the name of one customer?

A I believe that I have.

Q How many catalogs have you received?

A I don't know.

Q How many purchases have you made as a consequence of receiving that catalog?

A I don't recall.

Q Do you agree that Louisiana revised statute 473055 provides in part that the use tax intended to apply, and I quote, "tangible personal property after it has come to rest in the State and has become a part of the property in the State"—

MR. PUGH: I have no real objection except the statute speaks for itself. Whatever it says, it says. We ran into a problem earlier on the opinion aspect of it.

THE COURT: Yes, I think that is correct [115] and I think also that it is time to break. I don't see where we can gain anything by going on. This witness is going to be here.

MR. GRACE: Thank you, Judge.

(Court is in recess.)

THE COURT: Mr. Bradley, for the record, I remind you that you're still under oath. We will now continue your examination by the defendant.

MR. GRACE: Thank you, your Honor.

Q Mr. Bradley, I think before the break we were discussing revised Statute 47305, paragraph five, which appears on page 35, it's paragraph number five of page 35 of this booklet. Particularly the language in the statute which says that it's the intention [116] to levy a tax on property, about the last two lines on that paragraph. The question I have for you, Mr. Bradley, do you agree that the catalogs, which are the subject of this controversy, come to rest in Louisiana when they are received by the residents of Louisiana?

A Yes, when they are placed in a mailbox, I assume.

Q And is this the point in time which the State considers the tax to be imposed when they are delivered to the Louisiana residents' homes?

A Yes, at the time they are delivered.

Q Do you agree that at no time while those catalogs are in the United States mail that those catalogs are in the possession of D.H. Holmes?

A That's right.

THE COURT: You mean the physical possession?

[117] MR. GRACE: Yes, sir.

THE WITNESS: Right.

THE COURT: All right.

BY MR. GRACE:

Q You agree that when they are in the United States mail, Holmes has no right to retrieve those items out of the mail?

A I don't know that for sure.

Q Does the State contend that at some point in time while those catalogs are in the United States mail that the catalogs are under the control of D.H. Holmes?

A Yes.

Q Okay. At what point are points while those catalogs are in interstate commerce, do you content they are under the control of D.H. Holmes?

MR. PUGH: May it please the Court, I would object to the use of [118] the phrase "interstate commerce." That is a legal conclusion. If he wants to refer to the mail—

MR. GRACE: I will withdraw the question and rephrase it, your Honor.

Q At what point in time, while those catalogs are in the United States mail, does the Department of Revenue consider those catalogs to be under the control of D.H. Holmes?

A They're owned entirely by D.H. Holmes and D.H. Holmes controls their delivery. They come to rest in the State upon delivery to the customer.

Q In what way does D.H. Holmes control the delivery?

A They determine who they would be delivered to.

Q And is it your understanding that these catalogs are preaddressed outside of the State of [119] Louisiana?

A Yes.

Q After the catalogs are preaddressed and dropped in the United States mail, does D.H. Holmes exercise or have the right to exercise any control over those catalogs, do you know?

A I'm not sure during the period of transit, I would think there is a possibility if it is discovered that there

was a substantial error and it might not be easy, but they could contact the Postal Service when they first enter Louisiana and have them stopped, at that point it might be possible to prevent their distribution.

Q Do you know that to be a fact that they have that right?

A No, I do not.

Q When these catalogs come to rest in the State at that time and delivered to a Louisiana resident, what control do Holmes have over those catalogs [120] at that point in time?

A After they come to rest?

Q Yes, after they have been delivered to a resident and put in the mailbox?

A I don't know what control, they would probably have a responsibility, I guess, if the person received it, refused delivery, and would return it to the Post Office and put it back in their box saying, "Return to Sender."

Q Do you know where the return would go to, whether it would be interstate or out of state on those catalogs?

A I think it would go interstate, I'm not absolutely sure.

Q Do you know, or are you just speculating?

A I'm speculating.

Q Okay. Does the State contend that after these catalogs have come to rest and been deposited to residential mailboxes, that D.H. Holmes owns those [121] catalogs?

A Yes, sir.

Q You do?

A Yes.

Q And what is the basis for that contention, what is the factual basis, could you tell the Judge?

A Holmes purchased them and directed their delivery and until such time as the addressees pick it up and accepts it, it would be Holmes' property.

Q Is it your contention that Holmes has the right to go and retrieve them out of some residents' mailboxes if they are the owners?

A No, I believe there are other restrictions having to do with mailboxes, but that's for other purposes.

Q What rights of ownership does Holmes have after these catalogs are delivered into the mailbox of Louisiana residents, do you know what rights of [122] ownership they would have?

A Not specifically.

Q What right of control would Holmes have over these catalogs after they are delivered into the mailbox of the Louisiana residents?

A As far as the catalog itself or the purpose for which it was placed there—

Q I'm sorry, are we taxing the catalogs?

A Right.

Q Okay. Then let me just, and I'm sorry, I thought it was implicit in all my line of questioning. The catalogs, what right of control does Holmes have over those catalogs after they are placed in the mailboxes of the Louisiana residents?

A I'm not sure what the postal requirements would be, as I mentioned before, as far as responsibility—

Q All right. I think you previously [123] indicated that the moment of taxation and which gives rise of taxation is when they come to rest and they're taken out of interstate commerce, is that correct?

A Yes.

MR. PUGH: If you don't mind, that's a legal conclusion.

BY MR. GRACE:

Q All right. When they're taken out of the mail, is that the position the Department has, they're taken out of mail is when they're subject to tax?

A When it's delivered to the customer and placed in its receptacle through the slot, in his door or whatever it is.

Q So, if a catalog was delivered in 1978 then the taxes would be due, according to the position of the Department in 1978, is that correct?

A Yes.

Q Is it true even though Holmes may [124] have paid an invoice in 1979 for catalogs that were delivered in 1978?

A Yes.

Q And I believe, have you ever read the petition that's been filed in this lawsuit?

A Not completely.

Q Do you know if the petition referred to the tax year 1978?

A I believe it does.

Q There is no claim for any taxes due for 1978 whether candy or catalog?

A That's correct.

Q So, the petition is in error to that extent?

A There's no claim for '78.

Q Okay. So if there was any inclusion of the catalogs mailed in 1978, there was an error, which was unintended?

A If that is the case, I would assume it would be, yes.

Q Now, I understand that the amount of the use tax in Louisiana is based upon the value of a [125] particular item when that item comes into Louisiana, is that correct?

A Yes.

Q With regards to catalogs, at what point is that value determined when it is deposited—I'm sorry, strike that. Would you tell us at what point the value of the catalog, that we have been talking about, is determined?

A At the time it enters the State and comes to rest in the State.

Q And that again is when it's delivered to the mailbox?

A Yes.

Q Has the Department done any studies or does it have any sampling to make a determination of what the value of that catalog is after it is deposited in the mailbox of Louisiana residents?

A Our basis is the cost price at the time that it enters the State.

Q The cost price to Holmes?

A Yes.

[126] Q Would you agree that these catalogs don't have any transit value to Louisiana residents?

A They do to Holmes and that's who the owner was at the time of delivery.

Q What is the transit value, what can they do with those catalogs?

A To further their business—

Q Has the Department made any determination as to what that value is to Holmes?

A In the use tax situation, the value is not related to the taxes and incidentally, we have not, we have no need to.

Q Would you agree that the consumer in Louisiana, the residents who receive these catalogs use them after they have been delivered to them?

A Yes.

Q And would you agree that they are the owners of those catalogs when it's delivered to them?

A Once they have accepted.

Q And is it the State's contention [127] that if they're not accepted, until they actually remove them physically from the mailbox—-

A Yes.

Q And is it the State's contention that Holmes is the owner of those catalogs while they're in the mailbox?

A Yes.

Q It's the State's contention that Holmes can exercise various incidents of ownership over those catalogs while they are in the mailbox of Louisiana residents?

A Yes.

Q What direct services does Louisiana provide Holmes when Holmes mails these catalogs or when a printer mails Holmes' catalogs out of State to a Louisiana resident, what services is the State provide directly to Holmes?

A Since Holmes' primary business is located in the State, it receives all the benefits [128] enumerated before. It provides the service for the postal truck to drive to deliver them, protection for the post office employees and for the Holmes' employees.

Q Is this service provided directly to Holmes or to the Postal Service?

A Directly to the Postal Service, indirectly to Holmes.

Q Do you know whether or not Holmes pays the Postal Service to transport its product from New York to Louisiana?

A Holmes or it's representative does, yes.

Q Does the U.S. Postal Services pay any type of charge to the State for protection?

A Not that I know of, no.

THE COURT: Now, that's really irrelevant, isn't it.

BY MR. GRACE:

Q Do you agree that Holmes pays and collects sales taxes from sales [129] that may be generated through the distribution of these catalogs?

A Yes.

Q And does Holmes also collect and pay over to the State the sales tax on purchases made at their stores, except candy?

A Yes.

Q And in addition to the sales tax, do you agree that Holmes pays income franchise and other taxes in the State?

A I'm not personally aware, but I assume.

Q Didn't you know the amount that Holmes paid in these other taxes?

A No.

Q And doesn't Holmes pay use tax on other items that they have, for example, hangers?

A Yes.

Q And other computer equipment that they have or perhaps lease?

A Yes.

Q Does the State of Louisiana impose [130] use tax on catalogs accepted into the State by out-of-state department stores?

A Yes, if the department store has connection with the State.

Q What if the department store has no principal part with the State?

A If it does not meet the engaging business definition of Louisiana, say, tax law, we cannot require them to collect sales or use tax on sales made into the State on behalf of the Department.

Q And is this, is the use tax imposed on all dealers who import catalogs, whether it's a one page leaflet to a 500 page catalog?

A Yes, on the use tax we would. We cannot require them to collect and remit for us, but if we discover that in the audit, as has been done here, it would be assessed the same as Holmes.

Q How about a company that doesn't meet the definition of engaging [131] in business for Louisiana purposes, but nonetheless send catalogs in Louisiana? Do you impose a tax or make an assessment on those catalogs?

THE COURT: He said, "No." Didn't you answer that question? He answered that question.

MR. GRACE: I thought he said that there was a distinction between what company is engaged in business and not engaged in business.

THE COURT: He said that if he doesn't meet the definition that there is no way for them to collect a tax and none is imposed on them.

* * * *

[141] PAUL R. FALTER, 21 Siapi Street, New Orleans, Louisiana; after having first been duly sworn did testify as follows:

* * * *

CROSS EXAMINATION UNDER THE ACT

BY MR. PUGH:

Q By whom are you employed and in what capacity?

A D.H. Holmes, Company and I'm employed as the vice president/treasurer controller.

Q And how long have you been so employed?

A Since February 1965.

Q And had you worked for Holmes in any other capacity prior to this one?

A No, I have not.

Q Have you worked in any similar institutions prior to that?

[142] A Yes, I did.

Q And with whom were you employed prior to that?

A F & R Lazarus, Incorporated in Columbus, Ohio.

Q Is the nature of their business comparable to Holmes?

A Yes.

Q How long were you so employed by them?

A Approximately 18 years.

Q And in what capacity?

A As assistant controller. My ending job was assistant controller and I held various duties as I was rising up in the ranks through the assistant controllership.

Q You moved here to become the treasurer/controller?

A I moved here to become the controller, treasurer title was held later.

* * * *

[145] Q All right. As I appreciate it, from the record, the petition and the answer that the company was organized somewhere in 1905, is that right?

A It's approximately right, in 1842 the company was originally founded.

Q Is that when they started doing business on Canal Street?

A No, I can't answer those dates specifically, but I'm not that much of a historian on those years, but it was several years after the store opened in 1842 that they moved to Canal Street.

Q Do they own the property at Canal Street?

A Yes, we do.

Q Do you own any other locations?

A We own many locations.

Q All right, sir, will you identify for the Court the location that you own in the State of Louisiana?

A Well, let's see, we own the Canal [146] Street store. We own the Oakwood store. We own the Lake Forest store, I'm not positive on all of these.

THE COURT: Lake Forest, you own the land?

THE WITNESS: We own the store.

THE COURT: You own the store, but—

THE WITNESS: The land.

THE COURT: You're leasing out there, I'm sure?

THE WITNESS: As I said, I'm not that exactly positive on all of these.

THE COURT: But, what do you want, Mr. Pugh, those that they actually own? Ohio might be a common law state and they have all kinds of interest in land, but we're talking about ownership. I think Mr. [147] Pugh is talking about the ground upon which the stores rests.

THE WITNESS: We own them all. We own all of the land.

THE COURT: All right. We'll just take that.

BY MR. PUGH:

Q And there are some 15 such locations?

A In Louisiana we have 14, 13 locations.

Q You have locations in New Orleans?

A Orleans, yes.

Q You have locations in Jefferson?

A Yes, we do.

Q You have a location in Baton Rouge?

A Three locations in Baton Rouge.

Q You do?

A Yes.

Q And you have them in another city mentioned by the judge this morning?

THE COURT: [148] Lafayette, also Hammond and Houma.

BY MR. PUGH:

Q All right, sir. How many employees do you have?

A Approximately 5,000.

Q And how many customers do you have?

A Charge account customers, in the neighborhood of 500,000. These are approximate figures. I don't know the exact amount.

Q Yes. Has any study been made to ascertain the differential between charging customers and plain old customers?

A Pardon?

Q Do you have any idea how many customers you have beyond the charge customers?

A Probably double that amount, maybe triple the amount.

Q So, a million to a million-five?

A Right.

* * * *

[150] BY MR. PUGH:

Q Your counsel suggested this morning when he had a witness on the stand, that you paid no taxes in New York, is that a fact?

A That's a fact.

Q Is that because these catalogs are exempt?

MR. GRACE: I would object to the question. I think it is irrelevant to a determination here and I don't know if Mr. Falter has personal knowledge of what he's quali-

fied to do and I don't think there's been any foundation laid.

THE COURT: He can say, of course, whether he knows or not and as I [151] recall you were the one who opened that door.

MR. GRACE: I'm just saying—I don't care whether he said he did or didn't. I think the basis is a legal conclusion. It's like whether something is interstate commerce—

THE COURT: No, he asked him if he paid taxes in New York. That's what he asked him and he said no.

MR. GRACE: And he asked him the reason why, an exemption or something else.

THE COURT: Well, he didn't finish the question when you objected. We didn't even pay any attention to that part because he had not asked him it yet. Go ahead, Mr. Pugh, ask this [152] next question.

EXAMINATION BY MR. PUGH:

Q Why do you print your catalogs in New York?

A Why do we print the catalogs in New York?

Q Yes, sir.

A We print the catalogs in New York because we belong to a big organization that we all get together and we have the economy, a scale, we can have them printed in New York much less than we can for in Louisiana.

Q Do you know whether or not this group can give Louisiana that benefit?

Q Do you know whether or not this group can give Louisiana that benefit?

A I don't know.

Q What is the name of that group?

A Frederick Atkins.

Q Do they print all of your catalogs?

A Maybe I didn't answer you right. The group that we belong to is what I was trying to determine, they blend together to get the catalogs, that is a group of

[153] department stores all over the United States. That is the Fredrick Atkins Buying Organization.

Q And Holmes belongs to that?

A Holmes belongs to that.

Q And as a member of that organization, no attempt has been made to ascertain whether or not a Louisiana publishing house can do the same thing?

MR. GRACE: That is not what the testimony was.

THE COURT: Well, even if he did have knowledge, Mr. Pugh, maybe I'm the only one lost, but I am not able to follow the realm of this line of questioning. So, you better at least let me know.

MR. PUGH: The initial line of questioning was to ascertain whether they paid, and I got an [154] answer to that and the purpose for that was to show that it's fairly apportioned that Louisiana is not taking a tax away from another state.

THE COURT: Oh, I see.

MR. PUGH: That was the whole purpose of that.

THE COURT: I am sympathetic for us getting business for Louisiana, I didn't think that—

MR. PUGH: Yes.

THE COURT: All right.

EXAMINATION BY MR. PUGH:

Q On these catalogs that are printed, are they printed for the purpose of securing business?

A Printed for a purpose of attempting to secure business, yes, they are.

[155] Q Do they in fact secure business?

A To some degree, yes.

Q To such a degree to justify the cost of printing?

A I'd have to say yes.

Q Sir, do most of those catalogs provide a mail-in slip so that you can order things out of the catalog?

A Yes, they do.

Q Is your catalog order department very large?

A Compared to what?

Q Well, can you give me a comparison between your catalog sales and your over-the-counter sales, please, sir?

MR. RINKER: Your Honor, I object.

THE WITNESS: I don't have these figures available but they are very small.

MR. RINKER: We're talking about the period of '79, '81, so any circumstance could have [156] changed in the last four years. We would like counsel to phrase his question in terms of the period which is at dispute in this trial.

THE COURT: Okay, now, one thing, so we have the rules right. We don't want Mr. Pugh to go back to Monroe, Shreveport and say, "Look, those lawyers double-teamed me." It's all right for you all to shift around, but only one per witness. You see, you had better sit closer to him so that you tell him when he starts with his witness.

EXAMINATION BY MR. PUGH:

Q Please confine or assume that whenever I ask you a question it's in reference to the taxable period at issue with this court. When there are exceptions I will point them [157] out.

THE COURT: Very good, that will take care of it.

EXAMINATION BY MR. PUGH:

Q Can you give me a dollar percentage comparison for the catalog sales and over-the-counter-sales for the period?

A It would be speculation on my part. It would be a very low percentage, I would say, one to two percent, if that much.

Q In your experience in the business, is one to two percent of your volume, does that justify printing these catalogs?

A The business generated from the catalogs doesn't necessarily justify the printing of the catalog. You must keep your name in front of the public.

Q So, it serves more than one purpose?

A Yes.

Q In other words, the catalog is used for more than catalog [158] sales, it's to encourage people to use D.H. Holmes?

A Yes.

Q Isn't it a fact that D.H. Holmes' address on Canal Street is the return address on these catalogs?

A I can't answer that positively, but I believe it is.

Q Yes. Now, do you know who determines the name to whom catalogs are to be sent?

A Our sales promotion manager.

Q That is his responsibility?

A Yes, it is.

Q It's not a responsibility of this group that you all go to to have the printing costs lowered?

A No, it's not, because they have their own customers that they mail their own catalogs to.

Q So, you predetermine who you want to target for those catalogs?

A Yes.

Q And to the extent of this litigation, those are targeted to [159] specific people in Louisiana?

A Louisiana, Mississippi, Alabama, Pensacola, Florida.

Q For purposes of this litigation, they're targeted, however, for people in Louisiana and admittedly there are other people out of the State who—

A Yes.

Q Do you know whether there is any language on the address as to what is to occur if that person has moved or doesn't live there?

A I could not know.

Q You don't know if anything is put on there?

A I really don't.

Q Do you get any of those catalogs back?

A Yes.

Q Holmes prepays for the printing after the printing has occurred?

A We pay a portion in advance and pay the balance after it's printed and mailed.

[160] Q So, if there was a bill for 1976 rendered in 1977 to your company by the printer, then that bill would have been a partial bill for the printing and that part of it would have already been paid, is that your testimony?

A '76 and '77?

Q Yes.

A Would you mind repeating that again?

Q As I understand from you, what you're telling me is that you all pay in advance the portion of the printing and you pay the balance after the printing?

A Yes

Q Because we have a bill that we have discussed here that was paid in a taxable year but was supposed to have referred to a non-taxable year, you do not know what I'm talking about, I assume?

A Not in '76 and '77, no.

Q All right, sir, who determines how the shipment will be made, the [161] method by which the catalogs leave the printer, and arrive at a designation?

A The sales promotion manager makes that arrangement, makes that decision.

Q And do you know what that arrangement is?

A Yes.

Q And what is that arrangement?

A It's delivered to the post office and it's mailed into the various addresses on the catalogs.

Q Who delivers it to the post office?

A The printer.

Q Who pays the postage?

A We pay the postage through the printer. We send the printer the postage and the printer pays the postage.

Q As a matter of fact, you have a bulk rate arrangement on that printing, do you not?

A Yes, sir.

Q Is that bulk rate paid at the time of deposit of items with the [162] postal service, or do you know?

A I believe they are.

Q So, you permit them to use your bulk rate, is that correct?

A Yes.

THE COURT: Permit who, Mr. Pugh?

MR. PUGH: I'm sorry, the printer.

THE WITNESS: Yes.

EXAMINATION BY MR. PUGH:

Q And you, of course—

A I really would like to retract that. I really am not positive whether they're using our rate for postage or their postage. The sales promotional manager could answer that.

Q Do you expect him to testify?

A Yes.

Q The catalog does have an imprint reflecting Holmes' bulk rate on it, does it not?

A As I said, I'm not positive on that. It does reflect a bulk rate and probably does, but I [163] can't testify 100 percent.

Q I'm not suggesting to you, sir, that this was a catalog that was involved in a specific tax year, that is a brand new one?

A Brand new.

Q In fact, that is your current catalog?

A Yes.

Q Does that catalog not show the bulk rate to Holmes?

A Yes, it says, "bulk rate," U.S. postage paid Holmes.

Q And does it not state that if the recipient is not there or moved or words to that effect, give it to somebody else?

A It says, "Postal carrier, if no one, if the recipient has moved, please leave this with the current resident."

Q Even though you have targeted specific people, those specific people may not in fact receive this catalog?

A That's correct.

Q All right, sir. Have you had an [164] occasion to examine the amount of money that the State of Louisiana is contending is due from the sale of candy and also due on these catalogs?

A Yes, I am.

Q And was that information reflected in what has previously been identified at 2-B, I'll approach the witness, if I may, is this what you have reference to?

A Yes, it is.

Q So, subject to any testimony that may, on behalf of your lawyers, change these figures at least at the moment in this litigation, these figures are correct, is that right?

A That's correct, as far as the assessments was concerned, all I did was verify those amounts to the assessment and broken them down to three catalogs. Catalog issue, candy issue and all the others. Now, the purpose of doing that was so [165] that we could assess and calculate the amount of interest that was due on each one of those categories so that we could pay. As far as the accuracy of those catalogs and the candy being accurate, as far as including out-of-state sales, I didn't verify that. All I was doing was verifying the accuracy of the three categories and the calculations of the interest by the three categories.

Q You are the treasurer of D.H. Holmes, are you not?

A Yes.

Q Is it what you're telling me that you're not prepared to tell me now what your company owes, if it owes these taxes to the State of Louisiana?

A I am prepared to do that.

Q Are you telling me you're not prepared to testify as to how much your company owes the State of Louisiana?

[166] A Yes.

Q You are prepared to testify to that? Can you testify to that?

A I don't have the exact figure. I have them on the table, I believe some percentages. In other words, what I'm saying is, there should be some adjustment based on some things we discovered after I wrote that letter to verify the accuracy of their figure, not my figures.

Q I understand, sir, may I impose upon your counsel to give me, to give to you those figures so we can see where we're in agreement?

MR. GRACE: Would you come on down?

THE COURT: Feel free to do so. Go down and look at what you need and bring it back with you up to the witness chair.

(Off the record discussion.)

EXAMINATION BY MR. PUGH:

[167] Q All right, sir, in your responsibility of May 18, 1983 on behalf of D.H. Holmes, you used a catalog figure of $1,597,438.91. Can you tell me how, if at all, that should be adjusted monetarily?

THE COURT: $1,597,438.91?

MR. PUGH: Yes, your Honor.

THE COURT: Fine, thank you.

THE WITNESS: We have two invoices representing catalogs that were mailed in 1978.

EXAMINATION BY MR. PUGH:

Q All right, sir—

A One of them, it was $111,746.88.

Q All right, sir.

A And the other one was $21,124.30.

Q And that was mailed when?

A According to this here, but to the best of my knowledge, it was mailed in the end of December 1978. December 27th, [168] I believe, that's to the best of my knowledge.

Q Well, then, would you agree with me that the bulk rate mailing looks like some of those would not have been received until the following year?

A No.

Q You believe they were all received in the year of—

A They were delivered to the post office in 1978, in December 27th, I believe.

Q Yes, sir, and the bulk rate was used?

MR. GRACE: Your Honor, if I may just interrupt, I think if the witness prefaced this by saying it was hearsay information, we're going to have the manager of that department who will provide you with the correct information. He's got personal knowledge and [169] he's coming over and he will be one of our witnesses. So, rather than getting confused with hearsay, I think it would be best if the court heard the testimony from someone who's got personal knowledge and he will be here. You can ask Mr. Falter if he's got personal knowledge and—

MR. PUGH: If I'm given the assurance that the other gentleman will be here. Are you in a position with the candy, which appear to be $1,600—no, according to my figures that figure includes candy sales that were made in the State of Alabama and Mississippi.

Q Had you brought that to the attention of the department?

A I did not.

Q And how much are we talking about [170] in sales to Alabama and Mississippi?

A In 1979, 9.5 percent of our sales were in Alabama and Mississippi. In terms of New Orleans, you have to calculate it. In 1980 we had 8.8 percent. In 1981 we had 6.5 percent of our sales which were made in that state.

Q What scientific method did you use to compute that method?

A From our official accounting records within the company.

Q All right, sir. So then the only adjustment that you can testify to are what you just said and we'll wait on the gentleman for the other one.

A As far as the adjustment for the proposed assessment, we still don't necessarily agree that they are due.

Q I understand you're not saying the taxes are due, but what I want you to say, if you can, sir, is that subject to those [171] adjustments the balance there is due.

A I can say that.

Q If the Court so determines?

A I can say that.

• • • •

STEWART GAHN, 922 Ursuline Street, New Orleans, Louisiana; after having first been duly sworn did testify as follows:

• • • •

DIRECT EXAMINATION

BY MR. RINKER:

Q Would you state your name and address for the record?

[172] A Stewart Gahn, 922 Ursuline.

THE COURT: How do you spell that?

THE WITNESS: G-A-H-N.

EXAMINATION BY MR. RINKER:

Q Can you tell me whether you're currently employed and if so, where and in what capacity?

A I am currently employed at D.H. Holmes as Sales Promotional Director.

Q Were you employed in the year 1979, '80 and '81?

A Yes, I was.

Q And in what capacity?

A At the Canal Street store as the Sales Promotional Director.

Q Okay. What are your duties at Holmes as the Sales Promotional Direction?

A The planning of all advertising, radio, newspaper, television, catalogs.

Q Okay. Are you responsible for preparing all catalog advertising?

[173] A Yes, I am.

Q Where does Holmes ordinarily have its catalogs designed, printed and generally put together?

A They're all designed in New York. They're printed at either Atlanta, Boston, Oklahoma City and mailed from those points.

Q Okay. Are any of those catalogs printed in Louisiana?

A None.

Q Can you give us a description of what your catalogs look like, the number of pages, the general size or dimension?

A Well, they run from five and a half by eight inches, as much as maybe 16 pages to 64 pages, eight and a half by eleven inches.

Q During the year 1979 through '81, approximately how many catalogs did Holmes publish or has been publishing per year?

A Let's see, '79 was four, '80 was six and '81 was nine.

Q During this same base period of [174] '79-80 and '81, what percentage of the catalogs, which was published or designed through Holmes' direction, was sent to residents outside of the State of Louisiana?

A Eighteen percent of the total.

Q Where would the balance be sent?

A The balance, one thousand would be distributed to the Canal Street store for use within the store and the remainder would go into Louisiana via U.S. Post Office truck.

Q What percentage would be sent through the mail to Louisiana residents of these catalogs?

A That would be 82 percent, a little less when you take the one thousand out.

Q Okay. You alluded earlier in your testimony, but how are these catalogs, which are distributed to Louisiana residents, distributed, how do they get to the printer to the residents?

A Well, at the printing plant they're [175] labeled and placed on postal trucks which are sent to the various regional post offices.

Q And after the catalogs are distributed to the post office, what happens, does Holmes ever take possession, control of these catalogs at any time within Louisiana?

A We have no need to take possession or control of them. They're delivered right to the residential addresses.

Q To whom are these catalogs addressed?

A They're addressed to customers who are within the area of Louisiana, Mississippi and Alabama, residential addresses.

Q What is the cost for having these catalogs transported from the place where they're printed to Louisiana residents, how is it paid or—

A The cost is in the postage that we have to pay per book.

Q Okay. And who is responsible [176] for applying that postage or applying for any kind of exemption that might be applicable to the postage for these catalogs?

A Well, for applying the postage—

Q Who actually applies the postage?

A It is done by the printer. A check is sent to the post office in Oklahoma City, Boston or Atlanta.

Q Does Holmes ever take control over these catalogs that are preaddressed to Louisiana after they come into the State of Louisiana?

A No, we do not.

Q Does Holmes take them out of mailboxes?

A No, definitely not.

Q Does Holmes have the right to take them out of mailboxes?

A I don't think, I feel that is against the law.

Q Okay. When someone makes a purchase from these catalogs, Louisiana residents make a [177] purchase from the catalogs, is sales tax then collected by Holmes?

A Yes, a tax is collected on any item that is purchased from the catalog.

Q Does that same rule apply whether or not it's ordered by mail through the catalog or whether someone comes into the store after seeing the catalog?

A If it's ordered by mail or if they make a purchase in the store, tax is collected.

Q Does Holmes also collect tax from people, out of State sales tax, from people out of state?

A Yes, we collected for Alabama and Mississippi.

Q After these catalogs are distributed, and that is after they have been put in the mail, what is the value of, in transit value of the mass of paper to Holmes?

A Well, the mass of paper has no value to us once it's printed [178] and mailed. The only value it would be is a sale in which we do collect taxes.

Q Have you ever attempted to sell these catalogs?

A No, we have never sold catalogs.

Q Do you think that you could sell the catalogs?

A Well, it's not our policy to do it. I know that some stores do charge for a catalog.

Q Do you think that for a catalog of your size, and I think you described them in general, some of them are 16 pages, do you think you could sell those for a reasonable price or at least to cover the cost?

A I think you could if it was the policy of the company to do so.

Q Would somebody pay that, would somebody really pay—

MR. PUGH: If it pleases the Court, how would he know whether somebody would pay for a catalog?

[179] THE COURT: Well, I was thinking that maybe it would be in the best interest for us to continue to hear this because it's obvious to me that people are willing to pay for catalogs and they do pay for catalogs. And if he said anything different, I would wonder why he wasn't aware of the fact that there are a number of catalog companies that do sell their catalogs. They sell them in Louisiana. The objection is overruled.

BY MR. RINKER:

Q To your knowledge, are any of Holmes' catalogs ever sold or were they ever sold?

A No, the answer is no, they've got a policy against that. No.

Q Okay. Thank you. I'd like to show you some invoices and ask you to look at these and [180] identify them verbally. Just describe in general for the Court.

A This is a Harrison Service invoice dated December 21, 1978. It's for a winter white sale that we had published. This one is dated December 20, 1978, for a cosmetic, 12-page cosmetic book which was inserted within this white sale catalog.

Q What do these invoices purport to charge for?

A Well, these are the charges for the creative work, for the printing, for the paper, for the mailing, mailing charge.

Q Of what type item?

A Of the catalog.

Q Of the catalog?

A Of the catalogs.

MR. RINKER: Your Honor, I would like to offer, introduce and file into evidence as Holmes-3 A and B, the two invoices, A being the Harrison [181] Service invoice and B being the Belaire Associates invoice.

MR. PUGH: Without objection.

THE COURT: There being no objections, they will be admitted into evidence.

BY MR. RINKER:

Q I would like you to take a look at these invoices and tell me what the Harrison Services invoices are for?

A It's for catalogs.

Q Can you tell from that or from your independent recollection when this catalog was distributed?

A Well, it's our winter white sale catalog and that would have been distributed prior to December 26. The sale started December 26. It would have been prior to December 26.

Q The catalog—

A —placed in the mail. It would have been placed in the mail [182] prior to, I would say around the 20th of December. They would have been placed in the mail then.

Q Okay, and when would they have been scheduled to be received by Louisiana residents?

A Before the 26th or by the 26th. That was the break date of the sale.

Q The 26th of what year and month?

A Of December 1978.

Q I'd like you to also look at what we have previously labeled Holmes 3-B and ask what is that catalog, can you identify that?

A Yes, it's a 12-page cosmetic sale catalog, again a sale that is started December 26, 1978, and it was inserted within the white sale catalog. It was not mailed separately.

Q Would that have been received by customers at the same time as the previous catalog?

A Yes, it would have been.

Q And again, that would have been [183] received in what month, what year?

A December 1978 for the beginning of the sale on December 26. Those are annual sales. We have cosmetic sales and the white sale that occur in December.

MR. RINKER: I have no further questions at this point.

CROSS EXAMINATION

BY MR. PUGH:

Q Were you aware of the total costs attributable to these catalogs for the period in controversy?

A Yes, I am.

Q And what is that figure?

A I would have to see if I have that, for 1979 it would have been $520,000. For 1980, $670,000 and 1981, $834,000.

Q Do you have a total of that, sir?

A No, I don't have that total to those.

Q Give me those figures again, will you please, sir, the dollar amount?

[184] A $520,000, $670,000, $833,000 [sic].

Q How long have you been involved in this catalog mailing arrangement?

A About 20 years.

Q How long for Holmes, or have you been employed by someone other than Holmes?

A I've been employed by Sears years ago.

Q Is that part of the 20 years?

A No, 20 years for Holmes.

Q While working for Sears, were you doing similar work?

A Not in catalog work.

Q I see. You are in charge of the catalog advertisement?

A Yes.

Q Until you testified, it was the impression that all of these came from New York, am I in error, the four, six and nine for the respective years. Some of them came from a location in New York?

A Well, the creative work is all done in New York, and all of the [185] printing is done either in Atlanta, Boston or Oklahoma City.

Q All right, sir, and do you pay any taxes to Atlanta, Boston or Oklahoma City?

A No, there is no tax.

Q All right. So you do not pay a sales tax relative to the printing of these in the state in which they were printed?

A No, they do not levy a tax on there.

Q All right, sir. Now, you did furnish a list of people to whom the catalogs were to be sent, did you not?

A Yes, they were furnished by the store.

Q All right, sir. And where do you derive that list from?

A It is pulled from the current active charge account.

Q The individual who actively is buying from you, is that correct?

A Yes.

Q In your trade, would they be the [186] more likely people to send these catalogs to?

A Yes, definitely.

Q And Holmes pays for those catalogs?

A We pay for the catalogs.

Q Do you pay in advance or in the rears or is there a split charge?

A It's usually a split charge.

Q And Holmes' pays for the postage?

A We pay the postage.

Q As I understand, you send them out on bulk rate, is that correct?

A We do send them out at bulk rate.

Q Now, do you pay for a bulk rate based upon so much a bulk at the time of mailing, or is it a flat rate?

A It's a flat yearly fee.

Q Well. then is it fair to say that you pay the fee from D.H. Holmes for that yearly amount?

A From the store, yes.

Q In other words, then the fellow who does—

A The check is made payable to the [187] post office who is resporsible for sending it out.

Q So, it's not paid by the printer who prints them, it's paid by the store based upon the amount of printing that was done and sent out?

A The weight.

Q The weight?

A The weight of the bulk.

Q Would you agree with me that at the time that they are printed, Holmes owns them?

A At the time we never really owned them. We don't take possession of them.

Q Well, who owns them now?

A Well, they are paid for.

Q Does the printer own them?

A He has possession of them.

Q All right, sir. I don't understand the question of possession, who owns them?

A Holmes paid for the printing.

Q Sir, there is a contract between Holmes and the printer, is there not?

[188] A No, it is not between Holmes and the printer. The contract is between Holmes and the agent who does the creative work. They have a contract with the printer.

Q And in years, do Holmes benefit in that Holmes is the one that ends up or obtains the printed produce, if you will?

A We don't obtain the product. It's delivered right to a home.

Q I'm going to show you a current catalog, if I may. Is it your testimony to this Court that Holmes never owned that catalog?

A Well, it's never come into our possession except for the one thousand that come into our store, but the rest have been sent by the printer, given from the printer to the post office. This particular one was done in Boston.

Q Would you agree with me that that was an intangible—tangible [189] item, you can see it, you can fee it?

MR. GRACE: I object to the question, I think it's a legal conclusion.

THE COURT: Yes, whether it's a tangible or intangible, it's a legal conclusion.

EXAMINATION BY MR. PUGH:

Q That is a series of paper affixed together by some sort of sealing system, is it not?

A Yes, it is.

Q It has pictures on there, does it not?

A Throughout the book.

Q It was done for Holmes, was it not?

A Yes.

Q And paid for by Holmes?

A Holmes paid for it.

Q And you're telling me that Holmes pays for things it doesn't own, is that what you're saying?

A Well, other than the thousand books that come into the store, none [190] of them, you know, the rest are delivered right from the printer to the post office.

Q So, I understand what happens to them, I'm interested in Holmes' belief as to the ownership of them.

MR. GRACE: Your Honor, again, that calls for a legal conclusion and I think that to some extent Mr. Pugh is arguing with the witness. The question has been asked and answered two times.

MR. PUGH: I think we've spent about a half hour this morning talking about this very same thing with the Revenue Department as to who owned them, your Honor.

THE COURT: Well, you know, I think this witness is just flirting around an answer. I think [191] deep down inside he knows that Holmes purchased something for some money and that Holmes doesn't just give away its money.

THE WITNESS: Oh, no.

THE COURT: They purchased these, I assume they did pay. They bought them?

THE WITNESS: Yes.

THE COURT: They bought them from a printer or from a company a certain product?

THE WITNESS: Yes.

THE COURT: Yes. And when you buy something you own it, so, you know, I didn't think that that is causing us too much of a problem. As a matter of fact, I would suspect that counsel would [192] stipulate that at some point Holmes owned these catalogs, but let's move on because no need to—

BY MR. PUGH:

Q All right, sir. Now, would I have a way of knowing that I was on that list in advance of the time I receive that catalog?

A No, you wouldn't.

Q When is the first time I would know it, when I took it and physically saw it?

A When you take it from your mailbox.

Q All right, sir, the list, the distribution list for the residents, I believe you have already testified, was submitted by you all?

A Yes.

Q You called the distribution list to have me receive a copy, did you not?

A Well, we would, if you're an active charge account customer, your name would have been on that list.

* * * *

[194] EXAMINATION BY MR. PUGH:

Q I noticed that that catalog indicates that it is to go to some other residents if your targeted person doesn't live there?

A Right, if they have moved.

Q So, you don't even know whether or not the person is still there to receive it at the time you ship it, do you?

A No, not at the time we ship it.

MR. PUGH: Thank you. That's all the questions I have, your Honor.

REDIRECT EXAMINATION

BY MR. RINKER:

Q Mr. Gahn, in response to Mr. Pugh's questions, you gave him a [195] number of figures or values of catalogs during 1979, '80 and '81. Do those values, that you gave out, represent the total value of catalogs purchased?

A Yes.

Q They don't include catalogs that were sent out of state?

A No.

Q They don't—don't exclude other special situations, destroyed catalogs or catalogs delivered to the Holmes store or things like that?

A No.

Q On the bulk rate stamp that you mentioned was applied to the catalogs before they're mailed, who owns that stamp?

A Well, we pay a fee, a yearly fee for that stamp.

Q Is it Holmes' stamp?

A No, it's not Holmes' stamp. We pay it to the post office in Oklahoma, Boston or Atlanta. We do have one here in New Orleans, but that is Permit No. [196] 1 and that is Holmes' stamp for any mailing we would do here in the City.

MR. RINKER: Okay, your Honor, that's all the questions I have.

MR. PUGH: Before we release this witness, may I suggest to counsel that if we would stipulate that the two invoices that you have, that this witness identified, would be deducted from the amount, can we then agree on the amount that is due for catalogs if the Court finds—

(Off the record discussion.)

MR. PUGH: Your Honor, may we stipulate, we would like to stipulate for the record.

(Off the record discussion.)

MR. PUGH: May it please the Court, on behalf of Shirley [197] McNamara, plaintiff, and D.H. Holmes Company, Inc., defendant, counsel of record have ascertained that the amount in dispute for the years in question as it relates to catalogs, would result in a tax of $43,936.99 exclusive of interest, attorney's fees and costs, and that figure is arrived at by taking the figure $1,587,438.91 and we reduce it by the two invoices that were submitted for the Court's consideration and have been filed in evidence, relating to 1978.

THE COURT: All right, that is the stipulation, thank you very much. Gentlemen, I have a couple of questions I want to ask this gentleman. Since he's going to be going out of [198] town and we may not be able to get him back, the fact of the matter is that D.H. Holmes reimburses whatever amount the printer in Boston tells you he was charged by the post office, isn't that what happened?

THE WITNESS: Yes.

THE COURT: And it doesn't really make any difference who owns the mailing permit, the cost is computed by the post office, depending upon the size and weight of that which you are shipping?

THE WITNESS: Definitely.

THE COURT: Now, let us suppose that one of these catalogs, during the disputed period, was shipped from Boston and that is printed in Boston, [199] created in New York and printed in Boston, and it proceeded from the post office in Boston and it gets held up in Atlanta, no postal services—

THE WITNESS: Sometimes it's transferred at a different regional area.

THE COURT: Whatever is convenient for the airline and postal services, but this happens to stop in Atlanta and along comes somebody who is slightly off their rocker and they take two cans of red paint and pour all over your catalogs, those catalogs. Who do you imagine the post office would contact and say, "Look, these 25,000 catalogs have now been soaked with red paint"?

THE WITNESS: I would think they would [200] contact the printer who turned them over to the post office.

THE COURT: What do they have there at the post office showing that they came from the printer?

THE WITNESS: Well, they usually are bagged and I would think that the printers' bags would show their name.

THE COURT: You don't think they would contact D.H. Holmes?

THE WITNESS: It would be hard for me to say yes or no. It has never happened. In my 20 years, I have never had anything like that happen. I don't know if they would contact us or maybe just throw them away, because they're bulk rate. They don't get preferential treatment.

[201] THE COURT: You don't think that, don't you think at some point D.H. Holmes would know that 25,000 are not going to reach their designation?

THE WITNESS: I honestly could not say yes or no to that.

THE COURT: Okay. Let me ask you this. Someone alluded to this but I think that you would be the best person to answer. The printer in New York says that they just shipped 25,000 catalogs and they're headed down to New Orleans and one of your people on your staff, John Doe, made a correction on the price of a fur coat, you know, something substantial, and John says, "No, I didn't. I'm sure that the boss did," meaning you. [202] Someone goes out and has an abundance of caution and says, "Look, did you make that correction, you've got a fur coat advertised a thousand bucks and really it's five thousand." The printer is then contacted and the printer said that they shipped them last night. They've been sent to New Orleans, Baton Rouge, Alexandria, Shreveport, Monroe and all the major cities. They say that they got them. You recognize that you've got a

$4,000 mistake and subject to the regulations, whatever the regulations of the postal services are, would it not be incumbent upon D.H. Holmes or do you not feel D.H. Holmes would feel that it's incumbent on [203] them to put a hold on those catalogs?

THE WITNESS: Well, I can only tell you that we have had some price errors in books, but we have sold the merchandise at the price that it was in the book. There has never been a difference like that, a thousand, five thousand. There has been, you know, like maybe ten or fifteen dollars that one of our buyers failed to give us the correct price and it ran with the error. In that case we sold it at that price.

THE COURT: But, what would your position be with reference—maybe you're not able to tell me what your position is if there was a substantial error, if $4,000 error [204] price of a fur coat.

THE WITNESS: If it was a substantial error, I think you would have to, you would have to try and analyze how many of those you would possibly sell and is it worth then having that book completely redone, you know, if say it costs you $175,000 to have that book redone, plus you would have inventory on all that merchandise in your store that you can't sell until the new book is done, which would be a couple of months.

THE COURT: I see.

THE WITNESS: If it was a rather large figure it might be beter to sell the stock that you have and take your loss on that than to take any loss on [205] two or three hundred items that are in that book.

THE COURT: Tell me this, is it your position then that these catalogs represent D.H. Holmes and therefore, if not legal bounds by error but morally bound by error and it is likely that Holmes would sustain the loss as a result of that?

THE WITNESS: Yes.

* * * *

[286] MR. RINKER: We'd like to make a motion for directed verdict with respect to the catalog issue in light of the [287] cases that we presented in our earlier motion for summary judgement, which addresses essentially all of the issues setting forth the facts that's been presented here at trial. The cases clearly hold that when catalogs are mailed from an out-of-state printer directly to residents within the State of Louisiana, that those catalogs are not subject to State sales or use tax. These decisions are based on seven State Supreme Court cases. As a matter of fact, it addresses the question that your Honor posed to the witnesses with respect to control over the catalogs within the mail.

For instance, if paint was poured on the catalogs or [288] destroyed and Holmes may not have the right to withhold those catalogs or take them out of the mail, the cases specifically hold, and the case I have in mind is the Bennett Brothers out of the Supreme Court, the Court of Appeals in the State of New York held that that control was insufficient to justify the imposition of sales or use tax on catalogs.

In light of the cases that we presented to you in our motion for summary judgement, we would like to motion the Court for directed verdict on that issue alone at this time.

MR. PUGH: If I may speak to that, your Honor, the jurisprudence he's made reference to, I did call the Court's [289] attention earlier during an argument of the seven cases, five were decided before the Supreme Court on the question of interstate commerce whether or not anything in interstate commerce could be taxed. It's our position, your Honor, that Holmes, for its own benefit, elected to pay someone to design, in New York, and by their testimony, print catalogs which were delivered by the United States mail truck into the State of Louisiana where they first came to rest at the respective post office departments.

From there they were sent out, presumably, by foot mail carriers to the depositors indicated on this specific catalog. They would [290] customarily, and I think the Court can take judicial notice of the fact that they were put into their box.

Now, Holmes owns the catalog. They paid for their printing. They paid for the delivery to the customers. Now, when does the customer become the owner? First of all, they didn't sell them to this prospective customer. They didn't charge them for some of the value that the prospective customers would have paid.

First, everybody owns an object, whatever it is, it's owned by somebody. These catalogs were owned by somebody at all times. Now, they were owned by D.H. Holmes at the time they came into Louisiana, they were owned by D.H. [291] Holmes at the time they were put into the boxes. The only way there can be a transfer of ownership would be by gift. They decided they wanted to give those people those catalogs.

Now, to that end, of course, the law is clear on a gift, 1550 of the Code, 1540 of the Code is all clearly set forth that a donation duly accepted is perfected by the mere concept of the parties and the ownership of the object given are transferred to the donee without the necessity of any other delivery.

First of all, there must be an acceptance of it by the donee. They must consent on behalf of the donee to accept it to have a valid gift. The Code also says that the gift, this is [292] 1540, the gift becomes effective only from the day of its acceptance and until I get that catalog out of there and decide whether I want to keep it or throw it away, it belongs to D.H. Holmes. When I decide I want that catalog, then I have taken there gift with appreciation.

The testimony yesterday was that it has a value. They can do other things with it. The testimony yesterday was also that some of these are delivered back to the store. There was testimony also yesterday that they do put a provision on there that if in February, if Mr. Rob-

ert G. Pugh, the named addressee, is not there, then leave it or give it [293] to the current resident. It can come to me and I might not be there. I may have moved, and then they've got to give it to somebody else. It's not acceptable by the person, it has not been accepted by the person who received it either individually myself or this substitute person living there. Until that occurs, I can't see it any other way. Somebody owns it at all times. Everything that there is on this table is owned by somebody. Every piece of property is owned by someone, who owns it, I can't own something I don't even know anything about. There is no way I'm going to know what they are going to make a gift of, a catalog to me, and not until I'm going to [294] accept it. Up until that point, it ain't mine, your Honor, it belongs to D.H. Holmes.

THE COURT: I understand your point clearly. Tell me two things, I don't recall any of those cases having been from Louisiana—

MR. RINKER: That's correct, your Honor, that is all—

THE COURT: Number two, wouldn't you have to admit that those catalogs come to rest in the State of Louisiana under the ownership of D.H. Holmes, at some point, if by some means of methods delivered them straight from the printer into the box of the addressee?

MR. RINKER: At all points, I think inter[295]state commerce, and it's clear by the regulations, that it spells out, I think it's 47305, which says it is not the intent of the section to tax interstate commerce.

THE COURT: I understand that.

MR. RINKER: While it's in the mail, cases, we cite cases that are part of interstate commerce. At all times the catalogs are in the State of Louisiana, they are in interstate commerce until they are finally delivered to the selected resident. At that time, D.H. Holmes has no ownership rights, no possession or no control, as was pointed out by the State's own witness who said that you cannot get merchandise or items put [296] into the mailbox, in someone else's mailbox.

THE COURT: What about the fact that they stop here at the main post office and then they're taken from the main post office and they're delivered to one of the substations?

MR. RINKER: As the cases that we have cited, that is still in interstate commerce. Holmes has no right or control over those catalogs at any time at which they're taxed in state.

THE COURT: The other thing is, does D.H. Holmes have a right to or any of the department stores, have a right to circumvent the laws of the State by having its catalogs printed out of [297] state and shipped from out of state? Would a person, if they decided that they were going to let Edward Printing Company, which is a local printing company, do their catalogs and mail them, would that be subject to tax?

MR. RINKER: Yes, it would, your Honor, there's no question. As a matter of fact, the cases that we cited discussed the distinction between those two possibilities saying that if you print them in the State you pay the taxes and if you buy them from out of state, you don't pay the taxes.

THE COURT: So, you're saying then in effect, in answer to my other question, that Holmes has control over whether taxes are due on [298] certain items and not the legislature of the State of Louisiana?

MR. RINKER: To some extent, that's correct.

THE COURT: All right, the motion is denied. The Court is not satisfied.

MR. RINKER: I would like to point out, with respect to cases that Mr. Pugh has made a point and on a number of times even when we were arguing this motion for summary judgement, that's only five of the seven cases that we cited, five of the seven cases that we cited were decided before 1977-78 U.S. Supreme Court cases that he cited an objection to our motion. Two of those cases, however, were decided after the Supreme Court [299] cases that he cited, both of those were decided and as a matter of fact, cited earlier cases, not only that the cases

that were decided by the Supreme Court of the State of Washington was appealed to the United States Supreme Court, but writs were denied on that.

So, the Supreme Court had the chance to reverse itself and say that its earlier decision had amended that, but did not choose to do so.

THE COURT: They might not get another chance.

MR. RINKER: Thank you, your Honor.

THE COURT: The motion is denied. I don't need to hear any more about it. All right counselor?

* * * *

[378] PAUL FALTER, recalled to the stand.

* * * *

DIRECT EXAMINATION

[388] BY MR. GRACE:

Q What is the gross dollar value that Holmes did in all its stores in 1979-80 and '81 in that period?

A I can give you exact figures if I get that annual report that is on the desk.

THE COURT: Bring the annual report up to the witness. You should have it right there, it's the annual report.

A In response to your question, 1979, the annual sales were $159,745,000. In 1980, $176,548,000. In 1981, $197,320,000.

BY MR. GRACE:

Q To the best of your knowledge, is Louisiana income tax paid on that income?

A Yes, it is.

[389] Q Well, excuse me, with reference to that figure, do you have your income figure?

A Income figure, yes, we do. Before taxes, that is before Federal and State taxes, 1979 would be $6,350,000. 1980, $9,061,000. 1981, $8,206,000.

* * * *

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION: "H"

(Title Omitted in Printing)

RESTATED JUDGMENT

[Filed Mar. 25, 1986]

THIS CAUSE was heard on March 19 and 20, 1985, the Court having considered the evidence and the arguments presented, the Court found, in pertinent part:

> [T]hat there is no violation of the United States Constitution, more particularly the commerce clause thereof;
>
> [That the "use tax" imposed by the State of Louisiana under L.A. R.S. 47:305 (5), as it affects the distribution of catalogs by D.H. Holmes Company, Ltd. is valid and enforceable.

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D. H. HOLMES COMPANY, LTD., awarding to the said Petitioner, the sum of Forty Nine Thousand Seven Hundred and Ten and no 100 ($49,710.00) Dollars, together with statutory "*interest*" provided for in La. R.S. 47:1601 and "*attorney's fees*" provided in La. R.S. 47:1512.

Thereafter, a timely motion for new trial was filed, entertained, considered and rejected on the 13th day of December, 1985, and as a result thereof, this Court restates this judgment as follows:

The Court finds that there is no violation of the United States Constitution, more particularly the commerce clause thereof;

The Court further finds that the "use tax" imposed by the State of Louisiana under La. R.S. 47:305 (5), as it affects the distribution of catalogs by D. H. Holmes Company, Ltd. is valid and enforceable.

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D. H. HOLMES COMPANY, LTD., awarding to the said Petitioner the sum of Forty Nine Thousand Seven Hundred and Ten and no/100 ($49,710.00) Dollars, together with statutory *"interest"* provided for in La. R.S. 47:1601 and *"attorney's fees"* provided in La. R.S. 47:1512.

THIS restated judgment has thus been read and signed on the 25th day of March, 1986.

APPROVED AS TO FORM

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/s/ Revius O. Ortique
REVIUS O. ORTIQUE
Judge

[redacted]

[redacted]

[redacted]

QUESTION PRESENTED

Can a State impose a non-discriminatory Compensating Use Tax on a domestic Company which has catalogs printed out-of-state and controls their delivery by mail to its in-state customers, free of charge, where the State law provides a) that ownership by the Company of the catalogs is not dependent upon possession, and b) that ownership by the Company continues until the catalogs are accepted by the Company-designated donee.

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No. 87-267

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

D. H. HOLMES COMPANY, LTD.,

Appellant,

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee.

—o—

**ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA**

—o—

BRIEF OF APPELLEE

—o—

STATUTES INVOLVED

The following constitutional, statutory and regulatory provisions involved have been printed in the Appendix.

United States Constitution

Art. 1, Section 8, clause 3

Amendment 14, Section 1, clause 3

Louisiana Revised Statutes

R.S. 47:301 A Definitions
R.S. 47:302 A Imposition of tax
R.S. 47:303 A Collection
R.S. 47:321 A Imposition of (additional sales) tax

Louisiana Civil Code

L.C.C. Art. 481 Ownership and possession distinguished

L.C.C. Art. 1467 Methods of acquiring or disposing gratuitously

L.C.C. Art. 1468 Donation inter vivos, definition

L.C.C. Art. 1540 Donations effective from date of acceptance

L.C.C. Art. 1543 Acceptance during life of donee

Code of Federal Regulations

39 C.F.R. § 111 General Information on Postal Services

§ 111.1 Domestic Mail Manual; incorporation by reference of regulations governing domestic mail services

Domestic Mail Manual

152 Mail Deposit and Collection

152.7 Recall of Mail

39 C.F.R. § 281 Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophes

§ 281.1 Notification of firm mailers

39 C.F.R. § 912 Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

§ 912.5 Administrative claim; when presented

§ 912.6 Administrative claim; who may file

———o———

STATEMENT OF THE CASE

Statement of the Facts

D. H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation, founded in 1842. Its principal office is located at 819 Canal Street, New Orleans, Louisiana. (Joint Appendix 67) (hereinafter "J.A. —") Holmes owns and operates department stores at 13 locations in Louisiana (J.A. 68), a majority of which are in New Orleans. (Plaintiff's Exhibit 5, reproduced at J.A. 35-37). (Admitted in evidence, Transcript Record pages 149-150) (hereinafter "Admitted, T.R. —"). Others are in the Louisiana cities of Baton Rouge, Hammond. Houma, Lafayette and in Jefferson Parish. (J.A. 68-69) Holmes has 5,000 employees, 500,000 charge customers, and a million to a million and a half other customers. (J.A. 69)

The State of Louisiana provides substantial services for the benefit of Holmes, its employees and its customers. In Orleans Parish alone, for instance, Louisiana funds public education with direct appropriations to the Orleans Parish School Board in addition to minimum foundation funds of close to $100,000,000 a year; Louisiana pays $4,-800,000 a year for police supplementary pay; Louisiana funds mass transit at close to $5,000,000 a year; Louisiana supports the Audubon Park Zoo with $500,000 a year; Louisiana also allocates money for the judicial systems, firemen, sheriffs' deputies, both civil and criminal, coroners, assessors, district attorneys, and sewerage systems. Other than the zoo, assessors and this large amount for mass transit, all of the other parishes receive comparable funding based upon population, including, of course, those parishes where other Holmes' stores are located. (J.A.

JURISDICTION

The judgment of the Louisiana Court of Appeal was entered on March 16, 1987. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 4th Cir. 1987); Jurisdictional Statement Appendix 2A (J.S.App. 2A). Appellant's application for writ of certiorari to the Supreme Court of Louisiana, timely filed on April 14, 1987,[1] was denied on May 29, 1987. 506 So.2d 1224 (J.S.App. 11A).

Appellant filed its Notice of Appeal to this Court (J.S. App. 23A-26A) with both the Supreme Court of Louisiana and the Louisiana Court of Appeal, Fourth Circuit, and served this notice of appeal on the trial court, the Civil District Court for the Parish of Orleans, on June 29, 1987. Appellant filed a supplemental notice of appeal with the Supreme Court of Louisiana, the Louisiana Court of Appeal, Fourth Circuit, and the Civil District Court for the Parish of Orleans on August 4, 1987 (J.S. App. 27A-31A). Appellant's Jurisdictional Statement was filed on August 14, 1987, within ninety (90) days of the denial of Appellant's writ of certiorari by the Supreme Court of Louisiana. This Court noted probable jurisdiction on November 2, 1987. —— U.S. ——, 108 S.Ct. 283, 98 L.Ed.2d 244.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution:

* * * *

[1] La. Supreme Court Rule X, Section 4, Subsection (b) provides, in pertinent part: "The application [for a writ of certiorari] shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal . . . ."

The Congress shall have the power

* * *

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes

La. Rev. Stat. § 47:302(A)(2):

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

La. Rev. Stat § 47:321(A) provides:

> A. In addition to the tax levied by R.S. 47:302A and collected under the provisions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2 . . . the levy of said tax to be as follows:
>
> * * * *
>
> (2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

La. Rev. Stat. § 47:305(E) provides:

> E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.
>
> * * * *

18 U.S.C. § 1702 provides:

> **§ 1702. Obstruction of correspondence**
>
> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1708 provides:

> **§ 1708. Theft or receipt of stolen mail matter generally**
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or
>
> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

D.H. Holmes Company, Limited, is a Louisiana corporation with its principal place of business and registered office in New Orleans, Louisiana. Holmes has department stores in various locations within Louisiana, as well as in other states (J.A. 68, 78, 81, 82).[2]

The Louisiana Department of Revenue and Taxation (hereafter "Louisiana" or the "State") audited Holmes' sales/use tax returns for the calendar years 1979, 1980 and 1981. The State assessed Holmes for delinquent use taxes on the value of the catalogs designed, printed and mailed directly from outside Louisiana to the mailboxes

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[2] Appellant's record citations refer solely to the Joint Appendix (J.A.) and its Jurisdictional Statement Appendix (J.S.App.) where the page of the record or transcript have been reproduced therein. Appellant cites to the transcript (Tr.) and the record (R.) only when the referenced material is not reproduced in the Joint Appendix or the Jurisdictional Statement Appendix.

of Louisiana residents. Holmes protested the State's proposed use tax assessment on the value of these catalogs, and the State filed suit (J.A. 2-10).

Holmes answered the suit, expressly alleging that the application of the Louisiana use tax statutes in imposing a tax on the catalogs violated the Commerce Clause of the United States Constitution (J.A. 11-13). Holmes subsequently filed a motion for summary judgment challenging application of the statute on this constitutional ground (J.A. 14). The trial court denied Holmes' summary judgment motion on March 16, 1984 (J.A. 15).

The Civil District Court for the Parish of Orleans tried the case on March 19-20, 1985. At trial, the following testimony and evidence was presented.

During the calendar years 1979, 1980 and 1981, Holmes, as a member of Frederick Atkins Buying Organization, a trade organization through which Holmes and other retailers receive various benefits, including reduced catalog design and printing rates (J.A. 70-71), contracted with New York professionals to design merchandise catalogs (J.A. 80, 85, 87, 88). As Holmes' contract through the buying organization is with the New York catalog design professionals, not with individual printers, it had no direct control over where the catalogs were printed. Rather, the New York catalog design professionals contract with and arrange for the printing of catalogs (J.A. 87). Pursuant to this arrangement, the New York catalog designer had Holmes' catalogs printed in Oklahoma City, Boston, or Atlanta (J.A. 80, 85). The printers then addressed the catalogs (J.A. 81), arranged for bulk rate postage (J.A. 74, 81, 91), and mailed them at their respective local offices of the United States Postal Service, postage prepaid, directly to select residents of Louisiana, Mississippi, Alabama, and Florida

(J.A. 73, 74, 81). Holmes later reimbursed the cost of postage (J.A. 91).[3]

The printers mailed most of the catalogs, approximately 82 percent, from their respective locations in Oklahoma City, Boston, or Atlanta directly to Louisiana residents (J.A. 80-81). The printers mailed approximately 18 percent of the catalogs to residents of other states (*id.*). A small number of the catalogs, approximately, one thousand, were delivered to Holmes in New Orleans (*id.*). The purpose of the catalogs was to promote Holmes' merchandise and name and to generate sales (J.A. 71). Holmes absorbed the entire cost of these catalogs, including the cost of mailing; the recipients received the catalogs free of charge, as Holmes has a policy against selling merchandise catalogs (J.A. 82-83). Holmes ordered merchandise catalogs in 1979 at a cost of $520,000, in 1980 for $670,000 and in 1981 for $834,000 (J.A. 85).

The testimony of Holmes' witnesses demonstrated that at no time did Holmes or any of its agents or employees receive or take possession of the catalogs mailed to recipients from Oklahoma City, Boston, or Atlanta (J.A. 81, 87). If the recipient no longer resided at the address on the catalog, the Postmaster was instructed to leave the catalog with the current resident (J.A. 75-76). Even the State's principal witness, Mr. Roy C. Bradley, the Director of the Sales Tax Section of the Louisiana Department of Revenue (Tr. 13-14) agreed that after the out-of-state printers placed the catalogs in the mail, Holmes had no control over them (J.A. 57). He also conceded that after the catalogs are in the United States Mail, they are not in the possession of Holmes (J.A. 59). He further agreed that after the

[3] The State's allegation that Holmes had the catalogs printed and mailed outside Louisiana specifically to avoid the use tax, Appellee's Motion to Dismiss or Affirm, p. 2, has no factual basis and is not supported by the record.

catalogs are accepted by the recipients from the mail, they belong to the recipients, not to Holmes (J.A. 64).

Nevertheless, Bradley claimed that Holmes was responsible for the tax. He testified that Holmes causes the catalogs to be imported into Louisiana in furtherance of its business (J.A. 56-57). Despite his concession that Holmes had no *possession* over the catalogs in Louisiana, he testified that he believed Holmes *owned* the catalogs at the time they were placed in the recipients' mailboxes (J.A. 61-62, 63, 64). Bradley testified that the taxable moment occurs when the catalog is taken out of interstate commerce (J.A. 62-63), and that Louisiana considers this taxable moment to be the time the catalogs are placed in the recipients' mailslots or mailboxes (J.A. 59, 60).

Holmes paid no taxes on the catalogs in question in the states where they were designed and printed (J.A. 69, 85-86). However, Holmes pays substantial taxes to the State of Louisiana, including sales, use, franchise, rental, and income taxes (J.A. 54, 65-66, 82, 98). Holmes collects and remits to the state sales tax on items purchased as a result of the catalogs (J.A. 65, 82). Holmes paid income taxes to Louisiana in 1979, 1980, and 1981, respectively, on income of $6.35 million, $9.06 million, and $8.20 million (J.A. 98).

Holmes repeatedly challenged the constitutionality of the use tax statutes before, during and after trial. Before trial, in addition to its motion for summary judgment raising this issue (J.A. 14), Holmes preserved its constitutional objection in its pre-trial memorandum (R. Vol. 1, Holmes' "Pre-Trial Memorandum," 1-3). During the trial, Holmes moved for a directed verdict based on the unconstitutionality of the Louisiana statutes as applied (J.A. 94-98). Holmes' motion was denied by the trial court (J.A. 98). Holmes' post-trial memorandum also preserved the constitutional issue (R. Vol 1, Holmes' "Post-Trial Memorandum").

Nevertheless, on July 19, 1985, the trial court rendered judgment in favor of the State (J.S.App. 12A-15A). In its "Reasons for Judgment," the trial court found that the catalogs were taxable by the State, "[o]nce the catalogs reach the residences of the prospective customers to whom they are addressed" (J.S.App. 22A). The trial court concluded that applying the state statutes to tax the catalogs did not unconstitutionally burden interstate commerce under this Court's ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (J.S.App. 21A-22A).

Holmes appealed the trial court's decision to the Louisiana Court of Appeal, Fourth Circuit. The Fourth Circuit's decision, rendered on March 16, 1987, affirmed the trial court's ruling. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102, 105-06 (La. App. 4th Cir. 1987) (J.S.App. 2A-10A). The appellate court, like the trial court, found that after the catalogs were placed in the *mailboxes* of the Louisiana recipients, they were no longer part of interstate commerce and could be taxed under the Louisiana use tax statutes as part of Holmes' "property mass" located in the state (J.S.App. 7A). The state appellate court analyzed the application of the tax statutes under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), finding that the application of the taxing scheme did not violate the Commerce Clause (J.S.App. 2A-10A). The Court of Appeal found that the tax was not within the exemption provided by La. Rev. Stat. § 47:305(E) "on bona fide interstate commerce." (J.S.App. 8A-9A).

Having no further right of appeal under Louisiana law, Holmes filed an application for a writ of certiorari with the Supreme Court of Louisiana urging, *inter alia*, the unconstitutionality of the use tax statutes as applied. On May 29, 1987, the Supreme Court of Louisiana,

by a 4-3 vote, refused to exercise its discretionary jurisdiction, denying Holmes' application for a writ of certiorari. 506 So.2d 1224 (J.S.App. 11A).

Holmes timely filed its notice of appeal to this Court (J.S.App. 24A-26A, 27A-31A). Holmes filed its Jurisdictional Statement with the Court on August 14, 1987. This Court noted probable jurisdiction on November 2, 1987.

SUMMARY OF ARGUMENT

The State contended, and the courts below found, that it could assess its "use tax" against Holmes with regard to the merchandise catalogs shipped to Louisiana recipients via the United States Mail from out-of-state printers, because the catalogs were no longer part of interstate commerce at the time they were placed in the recipients' mailboxes. The courts below then found that the Louisiana use tax statutes, as applied to tax the catalogs at the recipients' mailboxes, did not unduly burden interstate commerce under the test enunciated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Washington Revenue Department v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

The Louisiana courts erred as a matter of law in sustaining the tax assessment on the catalogs against Holmes' Commerce Clause constitutional challenge:

A. The Louisiana courts erred as a matter of *federal* law in characterizing the tax as one on goods no longer in interstate commerce. The State urged, and the Louisiana Court of Appeal found, that the taxable moment to the *sender* was when the catalogs were placed in the *recipients' mailboxes*. This Court's jurisprudence has considered an item sent in the course of interstate commerce as part of interstate commerce for its entire journey until accepted by the recipient. Also, United States statutory law protects items placed in a recipient's mailbox as an integral part of interstate commerce. As a

matter of *federal* law, Holmes does not have, and cannot legally have, possession or control over the catalogs at the time they are in the recipients' mailboxes. At the time Louisiana taxed the catalogs, *they were goods in interstate commerce*, not part of Holmes' mass of property located in Louisiana.

B. The Louisiana Courts erred in analyzing the constitutionality of the Louisiana tax scheme under the test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Because the free flow of goods between the states is the heart of what the Commerce Clause protects, this Court, in a long line of cases, has prohibited *all* direct state taxation of *goods* while in the stream of commerce. Several state court decisions, including some virtually identical to the facts of this case, also have recognized that the Commerce Clause strictly prohibits the taxation of goods in the stream of commerce. Neither *Complete Auto* nor its Supreme Court progeny have sought to adjudge the Commerce Clause constitutionality of a tax imposed directly on *goods* in the stream of commerce. The Court should not extend the application of the *Complete Auto* test to such taxes, as that test does not adequately evaluate the burden such taxes place on interstate commerce. The Louisiana tax statutes, unlike past use tax cases considered by this Court, impose a direct tax on goods in interstate commerce by taxing not merely an *activity tangential* to the movement of goods in interstate commerce but the *goods actively* in interstate commerce. The Court, consistent with its past refusal to allow such taxation, should invalidate the Louisiana tax statutes as applied.

C. Alternatively, the Louisiana tax statutes as applied violate the Commerce Clause, even if *Complete Auto* and its progeny apply. The first part of the *Complete Auto* test requires that the *activity* sought to be taxed must have a substantial nexus with the taxing state. Assuming that the Louisiana tax impacts an *activity* (it does

not, see Arguments A and B), the "activity" taxed does not have any substantial relation to Louisiana. The catalogs are designed, printed, addressed and distributed by mail from outside Louisiana. Furthermore, Holmes has no possession or control over the catalogs while they are in Louisiana. Thus, the impact of the Louisiana use tax statutory scheme is to impose an impermissible sales tax on goods sold outside Louisiana.

Furthermore, this Court has never held that the *Complete Auto* test provides the only criteria for evaluating the Commerce Clause constitutionality of a state taxing scheme. The ultimate question is whether the tax unduly burdens interstate commerce. The Louisiana use tax statutes as applied unduly burden interstate commerce by artificially vesting an "ownership" interest in the *sender* at the *recipient's mailbox* while the goods still form part of interstate commerce, but long after the sender has relinquished all possession and control thereof. Thus, the Louisiana tax statutes as applied allow the State to tax *directly* all senders of advertising materials and commercial correspondence sent in interstate commerce through the United States Mail, even though the goods sent have no connection with the State other than the fact they are sent to a Louisiana resident. The impact of upholding this onerous Louisiana tax concept is to allow taxation *of the sender* on *all items* sent in interstate commerce to Louisiana residents via the United States Mail or another common carrier. Other state and local taxing jurisdictions then will be free to interpret similarly their tax statutes, severely burdening interstate commerce. This Court should invalidate this onerous Louisiana taxing concept as imposing an undue burden on interstate commerce, regardless whether the tax would pass the *Complete Auto* test.

ARGUMENT

THE LOUISIANA USE TAX STATUTES, AS APPLIED TO ASSESS HOLMES WITH A TAX ON CATALOGS MAILED DIRECTLY FROM OUT-OF-STATE PRINTERS TO THE MAILBOXES OF LOUISIANA RECIPIENTS, IMPERMISSIBLY BURDENS INTERSTATE COMMERCE BY DIRECTLY TAXING *GOODS* IN INTERSTATE COMMERCE

A. Holmes had no possession or control over the catalogs in Louisiana; the Louisiana statutes, as applied in this case, directly taxed *goods* in interstate commerce

The trial evidence demonstrates that Louisiana assessed Holmes with a tax on the catalogs at the time the catalogs were placed by the United States Postal Service in the recipients' mailboxes. Mr. Roy C. Bradley, Director of the Sales Tax Division of the Louisiana Department of Revenue and Taxation, testified that Louisiana considers its use tax imposed against Holmes on the catalogs at the time the catalogs are delivered to the recipient's mailbox, even though the State acknowledges that Holmes had no possession or control over the catalogs at that point:

> CROSS-EXAMINATION BY MR. GRACE:
>
> * * *
>
> Q. . . . The question I have for you, Mr. Bradley, do you agree that the catalogs, which are the subject of this controversy, come to rest in Louisiana when they are received by the residents of Louisiana?
>
> A. Yes, when they are placed in a mailbox, I assume.
>
> Q. And this is the point in time which the State considers the tax to be imposed when they are delivered to the Louisiana residents' homes?
>
> A. Yes, at the time they are delivered.

Q. Do you agree that at no time while those catalogs are in the United States mail that those catalogs are in the possession of D.H. Holmes?

A. That's right.

THE COURT:

You mean the physical possession?

MR. GRACE:

Yes, sir.

THE WITNESS:

Right.

(J.A. 59).

Based on the State's position, the Louisiana Court of Appeal found that the recipients' *mailboxes* constituted the taxable moment:

> After the catalogs were in Louisiana mailboxes, they were not part of interstate commerce and became part of the property mass in this state.

(J.S.App. 7A).

The Louisiana court erred as a matter of *federal* law in finding that the catalogs were no longer part of interstate commerce at the time they were placed in mailboxes of the Louisiana recipients. Clearly, the catalogs, designed in New York and printed in and mailed to Louisiana from Massachusetts, Oklahoma, and Georgia, formed part of interstate commerce. A product crossing a state line at any stage of its journey is in interstate commerce for its entire journey. *E.g., Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). This Court has considered a product as remaining in interstate commerce until ultimate delivery to the recipient. *See, e.g., Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (goods considered to have ended their journey in commerce where they reached a warehouse from which petitioner conducted a wholesale operation); *Adams Express Co. v. Kentucky*, 206 U.S. 129, 136 (1907) (goods considered in interstate commerce until delivery to the consignee). Specifically with regard to use taxes, this Court has implied that delivery to the consignee so as to withdraw the item from interstate commerce must be unequivocal; the Court stated: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the [out-of-state] sale itself." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937).

Furthermore, the postal statutes, consistent with this Court's jurisprudence, establish that the journey of goods mailed in interstate commerce is not complete until goods are *retrieved* by the recipient and *accepted* from his mailbox. *See* 18 U.S.C. § 1702 (protecting goods mailed until delivered "to the person to whom it was directed"); § 1708 (protecting against theft of mail from, *inter alia*, "letter box[es]," and "mail receptacle[s]"). As the Eighth Circuit noted in *United States v. Ashford*, 530 F.2d 792 (8th Cir. 1976), Section 1702 protects mailed items until "the mailed material is physically delivered to the person to whom it is directed or to his authorized agent. . . ." *Id.*, 530 F.2d at 795. Thus, the mailman's action in placing the catalog in the recipient's mailbox does not bring the catalog's interstate journey to an end. Not until the recipient removes it from the mailbox is its interstate journey complete.

Louisiana applied its use tax statutes in this case to impose a tax on Holmes and the catalogs long after Holmes' out-of-state printers had relinquished all possession and control over the catalogs to the United States Postal Service for their interstate journey to Louisiana recipients. This "mailbox" use tax clearly imposes a tax on *goods* while they are still in the course of interstate commerce. As submitted below, this Louisiana "mailbox" use tax statutory scheme unconstitutionally burdens interstate commerce.

B. The Louisiana "mailbox" use tax scheme unconstitutionally imposes a tax on goods in interstate commerce; the Court of Appeal erred in adjudging the constitutionality of the tax under the guidelines enunciated in *Complete Auto Transit, Inc. v. Brady*

1. *This Court's well-established jurisprudence strictly prohibits the taxation of goods in interstate commerce*

This Court long ago established that goods are immune from taxation while in the course of interstate commerce. In *Coe v. Town of Errol*, 116 U.S. 517 (1886), the Court held that once goods begin an interstate journey, they are immune from taxation until they end their journey. Subsequent cases have reaffirmed this principle. *See, e.g., Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 72-73 (1947), *quoting from Minnesota v. Blasius*, 290 U.S. 1, 9, 10 (1933) (quoted in Appellant's Jurisdictional Statement, p. 10).

The Court's recent jurisprudence has reconfirmed the continued protection from taxation afforded to goods while in the course of commerce. In *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974), the Court reaffirmed this fundamental constitutional protection relying on *Coe v. Town of Errol*. *Kosydar*, 417 U.S. at 66-67. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976), this Court again noted the continued protection afforded to goods while in the course of commerce.

The protection of goods from taxation while in interstate commerce is the heart of the protection afforded by the Commerce Clause. The Framers sought to preserve interstate commercial intercourse from the barriers imposed by state taxation of goods in commerce. As this Court recently noted in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986):

> As we have previously observed, "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). In recognition of the importance of this conviction, we have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation that is contrary to the constitutional principle of ensuring that the conduct of the individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause.

Wardair, 477 U.S. at ——, 91 L.Ed.2d at 9; *see also Michelin v. Wages*, 423 U.S. at 283 ("One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign commerce very much as they pleased.").

Furthermore, the protection from taxation afforded to goods while in interstate commerce applies whether or not the goods in commerce are "owned" by a resident of the taxing jurisdiction:

> That denial [to the states of the power to tax goods while in the course of interstate commerce] rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. *The fact that such a burden is sought to be imposed by the state of the domicil of the owner, upon property moving in inter-*

> *state commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens.* They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner, but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority.

Bacon v. Illinois, 227 U.S. 504, 511-12 (1913) (emphasis added).

Consistent with this Court's jurisprudence, several recent state court decisions recognize that the Commerce Clause prohibits the states from imposing a direct use tax on *goods* while forming part of interstate commerce.

The leading state court case, *Service Merchandise Co., Inc. v. Tidwell*, 529 S.W.2d 215 (Tenn. 1975), involves a fact setting virtually identical to the present case. There, Service Merchandise, a merchant doing business in Tennessee, had catalogs and other advertisement material designed and published in Minnesota for delivery to Tennessee recipients. Some of the materials were addressed and mailed directly by the printer from Minnesota. Other materials were addressed by the printer and sent by common carrier (truck) to post offices in Tennessee, where the materials were mailed to Tennessee residents. Still other materials were trucked by the printer to a packaging company in Illinois, where each piece was wrapped and addressed before being trucked by common carrier to Tennessee, where they were placed in the mail for delivery to Tennessee recipients. Tennessee sought to assess Service Merchandise with a use tax on the advertisement materials. The Tennessee Supreme Court found the state's attempt to tax the advertisement materials impermissible under the Commerce Clause, as they were in interstate commerce from the time of their original out-of-state shipment until delivery to the Tennessee recipients. *Id.*, 529 S.W.2d at 218-20.

Likewise, other state court cases have recognized the Commerce Clause protection from state and local taxation afforded to goods in transit in interstate commerce. *See, e.g., Deere & Co. v. Allphin*, 49 Ill. App. 3d 164, 7 Ill. Dec. 130, 364 N.E.2d 117, 120-21 (Ill. App. Ct. 3d Dist. 1977) (goods in question were found taxable as they had come into possession of the taxpayer outside of interstate commerce; the court recognized *Service Merchandise* as distinguishable); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531, 537 (Tenn. 1985) (the court recognized the *Service Merchandise* holding, but found the case before it distinguishable as goods came to rest in the state where a taxable service was performed); *Board of Publication of the Methodist Church, Inc. v. Woods*, 609 S.W.2d 501 (Tenn. 1980) (the court recognized *Service Merchandise* but found the facts distinguishable as a sale occurred in Tennessee and the goods were taxed before they entered interstate commerce); *see also District of Columbia v. W. Bell & Co.*, 420 A.2d 1208, 1210-11 (D.C. 1980) (while the court decided the case on statutory grounds, thus avoiding the constitutional question, the court found that catalogs sent in interstate commerce from outside the District of Columbia by a District of Columbia merchant to District of Columbia recipients were not subject to the District's use tax); *Bennett Brothers, Inc. v. State Tax Commission*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (N.Y. App. Div. 3d Dep't 1978) (New York court rejected the State's attempt to impose use tax on catalogs printed and mailed from out-of-state to New York recipients as the New York merchant had insufficient possession and control over the catalogs to justify imposition of the tax); *Hoffman-LaRoche, Inc. v. Porterfield*, 16 Ohio St. 2d 158, 45 Ohio Ops. 2d 486, 243 N.E.2d 72 (1968) (advertisement materials mailed from outside Ohio to Ohio recipients not subject to assessment of Ohio use tax; the court rejected the contention that the right to recall mailed materials under postal regulations vested possession of the goods in

the sender in Ohio sufficient to impose the tax); *Sears, Roebuck & Co. v. Lindley*, 70 Ohio St. 2d 249, 24 Ohio Ops. 3d 339, 436 N.E.2d 1029 (1982) (Ohio could not constitutionally impose its sales tax on catalogs printed and delivered out-of-state for distribution to Ohio recipients); *Modern Merchandising, Inc. v. Department of Revenue, State of South Dakota*, 397 N.W.2d 470 (S.D. 1986) (while not reaching the constitutional issue, the court found that South Dakota's use tax could not be applied to catalogs shipped on behalf of a mail order merchant doing business in South Dakota from out-of-state directly to South Dakota recipients; the court found insufficient possession for taxation in South Dakota as control of the catalogs within the state belonged either to the Post Office or to the advertisement recipient); *Wisconsin Department of Revenue v. J.C. Penney Co., Inc.*, 108 Wis. 2d 662, 323 N.W.2d 168 (1982) (the court found that Wisconsin could not tax catalogs sent by Penney from Indiana to Wisconsin; while the court did not reach the Commerce Clause issue, the court found that the catalogs remained the property of the printer until delivered to the recipient and that Penney had insufficient possession or control over the catalogs to support the imposition of the tax).

Similarly, the Louisiana "mailbox" use tax scheme in this case violates the Commerce Clause, because the catalogs upon which Louisiana assessed its use tax had not exited the course of commerce, as required by this Court's jurisprudence, and were not in Holmes' possession or control at the time the State imposed its tax.

2. *The Louisiana Court of Appeal erred in evaluating the Commerce Clause constitutionality of the Louisiana tax statutes under the four part* Complete Auto *test*

The Louisiana Court of Appeal evaluated the constitutionality of the Louisiana tax statutes under the four-part test enunciated in *Complete Auto Transit, Inc. v.*

Brady, 430 U.S. 274 (1977). The history of *Complete Auto* and its progeny demonstrates that this Court has never applied the *Complete Auto* test in upholding the constitutionality of a *direct* tax on *goods* still forming part of interstate commerce.

In *Complete Auto*, the Court addressed whether Mississippi could assess its sales tax on transportation services provided by Compete Auto in trucking new automobiles to Mississippi dealers from Jackson, Mississippi, where they were delivered from out-of-state by rail. In finding Complete Auto's transportation *activity* was not protected from taxation by the Commerce Clause, the Court enunciated a four-part test: (1) the *activity* sought to be taxed must be sufficiently connected with the state to justify the tax, (2) the tax must be fairly apportioned, (3) the tax must not discriminate against interstate commerce, and (4) the tax must be fairly related to benefits afforded the taxpayer. *Id.*, 430 U.S. at 287. Significantly, the Court was not presented with and did not address the question whether this test applied in determining the constitutionality of a direct tax on *goods* while in the course of interstate commerce.

Nor has this Court applied this test in any case where at issue was the constitutionality under the Commerce Clause of a *direct* tax on goods while still in the course of interstate commerce.[4]

---

[4] *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) (the *Complete Auto* test applied in assessing whether a business and occupation tax on stevedoring activities violated the Commerce Clause); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (the *Complete Auto* test plus additional factors considered in determining whether a property tax on cargo containers used in foreign commerce but temporarily located in California on "tax day" violated the Commerce Clause); *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980), and *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) (*Complete Auto* test applied in determining whether apportioned state income taxes violated the Commerce

Only one case decided after *Complete Auto, National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), discusses the *Complete Auto* test in a fact setting remotely analogous to the present case. There, the Court applied the *Complete Auto* test in evaluating whether California, where National Geographic had offices engaged solely in soliciting advertisement for its magazine, could require National Geographic to collect the use tax owed by California mail order purchasers of National Geographic goods from National Geographic's East Coast mail order business.

However, not even *National Geographic* presents the issue involved in this case. There the Court applied the *Complete Auto* test in evaluating the constitutionality of the *activity* of requiring National Geographic to collect a use tax *owed by others*. The Court did not apply the *Complete Auto* test in evaluating the constitutionality of a direct tax imposed on National Geographic. In the present case, Louisiana's statutory tax scheme, as applied, imposed a *direct use tax* on Holmes on the catalogs its printers shipped in interstate commerce, not an indirect duty to collect a tax owed by someone else.

Furthermore, the *National Geographic* Court expressly found that the fact situation presented there differed from a *direct* tax fact situation as presented in this case:

Clause); *Commonwealth Edison Co. v. State of Montana*, 453 U.S. 609 (1981) (*Complete Auto* applied in determining whether severance tax on coal mined in Montana violated the Commerce Clause); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Complete Auto* test discussed in determining whether severance tax imposed by Indian tribe violated the Commerce Clause); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986) (the Court noted, without discussing, the *Complete Auto* test in evaluating whether a Florida tax on aviation fuel sold in Florida to a Canadian airline violated the Commerce Clause); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ——, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (Court applied *Complete Auto* test in determining whether tax imposed on operation of trucks over the state's highways violated the Commerce Clause).

> However fatal *to a direct tax* a "showing that particular transactions are dissociated from the local business . . . ." Norton Co. v. Illinois Rev. Dept., [340 U.S. 534] at 537 [(1951)]; American Oil Co. v. Neill, [380 U.S. 451 (1965)]; Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

National Geographic, 430 U.S. at 560 (footnote omitted; citation material in brackets added; emphasis added). Thus, *National Geographic* implies that even after *Complete Auto*, there is no need to apply the *Complete Auto* test to such a direct tax on goods in interstate commerce, as such taxes are *per se* violative of the Commerce Clause. *See* Argument B.1, *above*.

Nor should the Court extend application of the *Complete Auto* test to direct taxes on goods in interstate commerce. The free movement of goods between the states is the heart of what the Commerce Clause seeks to protect. Ensuring the free movement of goods in commerce was one of the compelling reasons, if not the paramount reason, leading to the Constitutional Convention, and ultimately, to the establishment of the United States under a federal form of government. *See Wardair*, 477 U.S. at —, 91 L.Ed.2d at 9; *Michelin*, 423 U.S. at 283. While some state taxation may be permissible on goods, *before* and *after* their transit in the stream of interstate or foreign commerce, and while some state taxation may be permissible on *activities* in interstate commerce conducted within the borders of each individual taxing state, the free movement of goods can only be protected if the states are prohibited from directly taxing goods while in the course of interstate commerce.

The *Complete Auto* test, while useful in evaluating the burden placed on commerce by taxes tangentially related to interstate commerce, such as taxes on fuel and vehicles used to transport goods and taxes on the goods

themselves before and after their journey in interstate commerce, does not protect the free flow of interstate commerce where the tax in question is directly aimed at *goods* while they form part of interstate commerce. A tax on goods while in interstate commerce, even passing all four parts of the *Complete Auto* test, nevertheless imposes a devastating burden on interstate commerce. *See* Argument C.2, *below*, discussing the burden the present tax places on interstate commerce. Indeed, every state through which goods pass can claim some significant relationship between the goods and the state; also, the tax on the goods, on its face, may be apportioned and nondiscriminatory and may facially be related to services provided to the taxpayer in the state. Nevertheless, interstate commerce is burdened, because the tax is on the *goods* forming part of an interstate journey, which forms the essence of commerce. If allowed here, such taxes may be assessed by every state touched by the goods, even though the only relationship between the goods and the taxing state is interstate commerce. Allowing such taxation necessarily puts goods marketed between states at the disadvantage that the Framers sought to protect against in adopting the Commerce Clause. Also, allowing such taxation in this case will invite a tangled web of state and local "mailbox" taxation, severely burdening the flow of goods in commerce. The extension of the *Complete Auto* test to direct taxes on goods while forming part of interstate commerce will only provide the states with the methodology to mask as legitimate unconstitutional taxation imposing a direct burden on the free flow of commerce. This Court should not extend application of the *Complete Auto* test to direct taxes on goods in interstate commerce; the free movement of goods in interstate commerce is assured only by maintaining the long-established absolute prohibition against direct taxation of goods in the stream of interstate commerce.

3. *The Louisiana use tax statutes, as applied in this case, tax goods in interstate commerce in violation of the Commerce Clause*

Louisiana applied its use tax statutes to assess Holmes with a tax on the merchandise catalogs while the catalogs still formed part of interstate commerce as part of the United States Mail. *See* Argument A, *above*. This "mailbox" use tax scheme is dissimilar to the use taxes discussed in past cases decided by the Court. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co., Inc.*, 312 U.S. 373 (1941).

Henneford and *Monamotor* upheld use taxes on property in the possession of the taxpayer which had come to rest as part of the mass of property in the state at the time the state imposed the use tax. In the present case, at the time Louisiana imposed its use tax, the catalogs were not in possession of Holmes and were still goods in interstate commerce.

Nor is this case like *Nelson v. Sears* or *Nelson v. Montgomery Ward* where the state imposed upon a local merchant a duty to collect a use tax *owed by others* resulting from the merchant's out-of-state sales shipped to residents in the taxing jurisdiction. In those cases, as in *National Geographic*, discussed above, the taxable incidence was on the *recipient* of the goods, not the *sender*, and occurred while the recipient had possession and control over the goods in the taxing state. This case involves a direct tax assessed against Holmes as an out-of-state sender, not the catalog recipients, and is assessed on the catalogs *before* they have completed their journey in interstate commerce.

This Louisiana "mailbox" use tax statutory scheme is unconstitutional as applied in this case, because it directly taxes goods while they still are in interstate

commerce contrary to this Court's established jurisprudence. Accordingly, this Court should reverse the judgment of the Louisiana Court of Appeal.

C. Alternatively, even if the *Complete Auto* test applies in assessing whether the Louisiana use tax statutes violate the Commerce Clause, the tax statutes, as applied in this case, unduly burden interstate commerce and are unconstitutional

1. *The Louisiana Court of Appeal misapplied the* Complete Auto *test; the "activity" sought to be taxed does not have a substantial relationship to Louisiana*

Even assuming that the *Complete Auto* test applies here, the Louisiana use tax statutory scheme, as applied to this case, violates the Commerce Clause. The Louisiana Court of Appeal misapplied the first part of the *Complete Auto* test. While the first part of the *Complete Auto* test focuses on whether the *activity* sought to be taxed is sufficiently connected with the state to justify a tax, *see Complete Auto*, 430 U.S. at 287, the Louisiana Court of Appeal erroneously focused on the relationship between *taxpayer* and the state. The Court of Appeal found:

> A state tax can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state . . .
>
> The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street store.

(J.S.App. 8A-9A).

Holmes does not dispute that *it* has a substantial connection with Louisiana, as found by the Court of Appeal. However, this finding begs the question, as *Complete Auto* test also requires a *substantial* relationship between the *activity* sought to be taxed and the state. *See also*

American Oil Co. v. Neill, 380 U.S. 451, 457 (1965) (noting that this Court has struck down tax statutes on out-of-state sales insufficiently related to the taxpayer's activities in the state).

The only connection between the "82% of the catalogs" which are the subject of this case and Louisiana is that the catalogs were sent via interstate commerce directly to the mailboxes of Louisiana recipients. However, the catalogs were designed in *New York*, not *Louisiana*. They were printed, addressed, and mailed from *Georgia*, *Massachusetts*, and *Oklahoma*, not *Louisiana*. Clearly, as the activities regarding these catalogs occurred in New York, Georgia, Massachusetts, and Oklahoma, these states had the constitutional power to tax the catalogs. However, once the catalogs were mailed from outside Louisiana, Holmes had no possession or control over them. Neither the catalogs nor the activity of mailing them had any substantial relationship with Louisiana justifying a use tax on the catalogs consistent with the Commerce Clause.

This absence of a relationship between the "activity" and the State renders the Louisiana taxing scheme, as applied, unconstitutional. Furthermore, this Court's jurisprudence provides that the Court, in assessing the constitutionality of a tax statute, will look to the impact of the tax, not the label placed thereon by the taxing state. *See, e.g., American Oil v. Neill*, 380 U.S. at 455; *Nelson v. Sears*, 312 U.S. at 363. As neither the printing, addressing, or distributing by mail of the catalogs had any relationship to Louisiana, and since Holmes never had possession or control over the catalogs in Louisiana, the practical effect of the State's use tax statutes was to impose an impermissible *sales* tax on catalogs "purchased" out of state. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *see also Evco v. Jones*, 409 U.S. 91, 93 (1972) (gross receipts tax on sales of property in another state imposes an impermissible burden on interstate commerce).

The catalogs lacked the substantial relationship with Louisiana required by the *Complete Auto* test, even assuming that that test applies in this case. Further, the impact of the assessment against Holmes is impermissibly placed on transactions and activities that occurred in other states. The Court should reverse the judgment of the Court of Appeal.

2. *The* Complete Auto *test does not exclusively define the parameters of taxation permissible under the Commerce Clause; notwithstanding the* Complete Auto *test, the Louisiana use tax statutes, as applied, violate the Commerce Clause by promoting the "economic Balkanization" that the clause was aimed at prohibiting*

This Court has never held the four part test to provide the *only* factors to be considered in assessing the constitutionality of state tax statutes under the Commerce Clause. Both before and after the *Complete Auto* decision, the ultimate determinative factor, and the factor which the *Complete Auto* test was aimed at determining, is whether the state tax statute impermissibly and unduly burdens interstate commerce. *See, e.g., Wardair v. Florida*, 477 U.S. at ——, 91 L.Ed.2d at 9-10 (the purpose of the Commerce Clause is to insure that state regulation "does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States . . ."); *Washington Stevedoring*, 435 U.S. at 748 (a tax may impermissibly burden interstate commerce when it exacts more than a just share from the interstate activity); *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (taxation on mail order sales unduly burdens interstate commerce where the taxpayer had no other connection with the taxing state).

The Court has not hesitated to go beyond the *Complete Auto* test where the factors enunciated therein insufficiently gauged whether the effect of a state taxing scheme placed on commerce was unduly burdensome. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), for example, because the *Complete Auto* test insufficiently measured the burden placed by a tax where foreign commerce was involved, the Court added two additional factors in finding a Los Angeles property tax on cargo containers used in foreign commerce unconstitutional. Similarly, the Court considered the two additional *Japan Line* factors in *Wardair v. Florida*, 447 U.S. 1, in upholding the constitutionality of a Florida fuel tax imposed on fuel sold to an international air carrier in Florida.

If the *Complete Auto* test applies at all here, this Court should look beyond that test in adjudging the constitutionality of this Louisiana "mailbox" use tax scheme and other tax schemes directly taxing goods in interstate commerce. As applied by the State and as interpreted by the Louisiana Court of Appeal, the Louisiana tax scheme rendered the catalogs taxable property belonging to Holmes only by *artificially* designating Holmes as the *owner* of the catalogs when they reach the recipients' mailboxes, *even though the State's own witness, the head of the State's Sales Tax Division, admitted that Holmes had no possession or control over the catalogs at this point.* United States law, discussed in Argument A, *above*, confirms that Holmes can have no real ownership, possession, or control over the catalogs while they are in the recipients' mailboxes. Yet Louisiana, by creating this artificial "mailbox ownership" concept, taxed the catalogs and assessed Holmes.

This Court should strike down this onerous Louisiana taxation concept because of the overwhelming burdens it places on interstate commerce. By defining ownership in the *sender* at the *recipient's mailbox*, the State, through its use tax statutes, can impose a tax on every catalog, every advertisement flyer, indeed on every piece of commercial correspondence and item sent to a Louisiana addressee.

While the impact of the Louisiana tax statutes on interstate commerce between other states and Louisiana

alone is staggering, the Louisiana implications are but the "tip of the iceberg." At present, forty-five (45) states and the District of Columbia impose sales and use taxes. *See* R. Rotunda, J. Nowak, J. Young, 1 TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 13.6(b) n.72 at 790 (1986). Additionally, there are innumerable local taxing jurisdictions in the United States.[5] If this Louisiana taxing scheme is upheld, all 45 state "use tax" jurisdictions, the District of Columbia, and all local taxing jurisdictions having a use tax will be free to interpret similarly their use taxes. The direct net effect of sustaining the tax in this case could be the imposition *at the consumer's mailbox* of a tax (or taxes) assessed against the sender on *every* piece of commercial mail sent in interstate commerce.

This Court, in striking down a mail order tax in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753 (1967), stated:

> Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a "fair share of the cost of local government."
>
> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Id., 386 U.S. at 759-60 (emphasis added; footnotes omitted). While this case differs in several respects from *National Bellas Hess*, the burdens on interstate commerce resulting from the Louisiana "mailbox" taxing scheme are no different. Clearly, the impact of this Louisiana taxing scheme impermissibly burdens interstate commerce.

The *Complete Auto* test inadequately adjudges the burden placed on interstate commerce when the impact of the tax is on goods still in the stream of commerce. Regardless whether such taxes satisfy the *Complete Auto* test, they directly inhibit the free flow of commerce by encouraging the "economic Balkanization" that the Framers sought to protect against. *See Wardair v. Florida*, 477 U.S. at ——, 91 L.Ed.2d at 9-10, *quoted* at pp. 16-17, *above*. The free movement of interstate commerce is severely jeopardized if every state that touches such goods is free to impose a direct tax on them. The net result is a web of state and local taxation and the resulting administrative burdens on all goods mailed in interstate commerce. This Court should strike down the Louisiana use tax statutes as applied in this case as violative of the Commerce Clause.

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[5] This Court noted in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. at 759 n.12, that in 1965, over 2,300 localities imposed sales taxes, and most sales taxes are complemented by a use tax. At present, there exist approximately 6,700 taxing entities in the United States. *See* Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales*, p. 47 (1986).

CONCLUSION

Holmes submits that the Louisiana "mailbox" use tax statutory scheme, as interpreted to impose a "use tax" on the catalogs mailed in interstate commerce to Louisiana recipients, impermissibly burdens interstate commerce in violation of the Commerce Clause. This Court should strike down the Louisiana tax, as applied, and reverse the judgment and opinion of the Louisiana Court of Appeal, Fourth Circuit, holding the tax statutes and tax assessment thereunder, constitutional under the Commerce Clause.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

In The

Supreme Court of the United States

October Term, 1987

D. H. HOLMES COMPANY, LTD.,

Appellant,

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee.

**ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA**

BRIEF OF APPELLEE

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February 8th, 1988

QUESTION PRESENTED

Can a State impose a non-discriminatory Compensating Use Tax on a domestic Company which has catalogs printed out-of-state and controls their delivery by mail to its in-state customers, free of charge, where the State law provides a) that ownership by the Company of the catalogs is not dependent upon possession, and b) that ownership by the Company continues until the catalogs are accepted by the Company-designated donee.

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No. 87-267

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

D. H. HOLMES COMPANY, LTD.,

Appellant,

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee.

—o—

**ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA**

—o—

BRIEF OF APPELLEE

—o—

STATUTES INVOLVED

The following constitutional, statutory and regulatory provisions involved have been printed in the Appendix.

United States Constitution

Art. 1, Section 8, clause 3

Amendment 14, Section 1, clause 3

Louisiana Revised Statutes

R.S. 47:301 A Definitions

R.S. 47:302 A Imposition of tax

R.S. 47:303 A Collection

R.S. 47:321 A Imposition of (additional sales) tax

Louisiana Civil Code

L.C.C. Art. 481 Ownership and possession distinguished

L.C.C. Art. 1467 Methods of acquiring or disposing gratuitously

L.C.C. Art. 1468 Donation inter vivos, definition

L.C.C. Art. 1540 Donations effective from date of acceptance

L.C.C. Art. 1543 Acceptance during life of donee

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Domestic Mail Manual

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152.7 Recall of Mail

39 C.F.R. § 281 Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophes

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39 C.F.R. § 912 Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

§ 912.5 Administrative claim; when presented

§ 912.6 Administrative claim; who may file

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STATEMENT OF THE CASE

Statement of the Facts

D. H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation, founded in 1842. Its principal office is located at 819 Canal Street, New Orleans, Louisiana. (Joint Appendix 67) (hereinafter "J.A. —") Holmes owns and operates department stores at 13 locations in Louisiana (J.A. 68), a majority of which are in New Orleans. (Plaintiff's Exhibit 5, reproduced at J.A. 35-37). (Admitted in evidence, Transcript Record pages 149-150) (hereinafter "Admitted, T.R. —"). Others are in the Louisiana cities of Baton Rouge, Hammond, Houma, Lafayette and in Jefferson Parish. (J.A. 68-69) Holmes has 5,000 employees, 500,000 charge customers, and a million to a million and a half other customers. (J.A. 69)

The State of Louisiana provides substantial services for the benefit of Holmes, its employees and its customers. In Orleans Parish alone, for instance, Louisiana funds public education with direct appropriations to the Orleans Parish School Board in addition to minimum foundation funds of close to $100,000,000 a year; Louisiana pays $4,-800,000 a year for police supplementary pay; Louisiana funds mass transit at close to $5,000,000 a year; Louisiana supports the Audubon Park Zoo with $500,000 a year; Louisiana also allocates money for the judicial systems, firemen, sheriffs' deputies, both civil and criminal, coroners, assessors, district attorneys, and sewerage systems. Other than the zoo, assessors and this large amount for mass transit, all of the other parishes receive comparable funding based upon population, including, of course, those parishes where other Holmes' stores are located. (J.A.

43-45, 50-51. Plaintiff's Exhibit 1, reproduced at J.A. 20-34. Admitted T.R. 52.)

Holmes has thrice judicially acknowledged these broad based services. "As we pointed out earlier, this matter is really without dispute. There is no doubt that the State of Louisiana provides numeral (sic) services including fire, police protection, sanitation, and all types of services." (Mr. Rinker. J.A. 42) "[T]here is no dispute that services are provided through money provided by the State." (Mr. Rinker. J.A. 51) "Holmes does not dispute that it has a substantial connection with Louisiana, as found by the Court of Appeal." (Appellant's brief page 26)

For the purpose of securing business, Holmes had merchandise catalogs printed for distribution to its customers in Louisiana. (J.A. 71) In addition to this directly secured business, Holmes indirectly secured business with these catalogs by keeping Holmes' name before the public and thereby encouraging people to shop at Holmes. (J.A. 72-73) The catalogs also provide a mail-in slip insert to facilitate mail orders out of the catalogs. (J.A. 71) Holmes pays for these catalogs as well as the bulk rate postage thereon. (J.A. 75, 81, 86-87)

The Louisiana people to whom these catalogs were targeted were determined by Holmes' Sales Promotion Manager, and the catalogs mailed shortly prior to Holmes' promotional sale dates. (J.A. 72-73, 84, 86) Even though Holmes purchased and owned these catalogs (J.A. 87-91), an intended recipient would not know of their existence or that he might receive a catalog from Holmes. (J.A. 89) He could not buy a catalog even if he knew of their exist-

ence, for Holmes has a policy prohibiting the sale of their catalogs. (J.A. 83)

The return address used on Holmes' catalogs is Holmes' New Orleans, Louisiana, Canal Street address, and it was to this address that some of these catalogs were returned. (J.A. 73) (Plaintiff's Exhibit 6, reproduced in part, J.A. 38, 39. Admitted, T.R. 193-194) Holmes' catalogs contained the instruction "postal carrier, if the resident (addressee) has moved, please leave this with the current resident". (J.A. 75) (Plaintiff's Exhibit 6, J.A. 39) Even though Holmes targeted specific people to receive Holmes catalogs, Holmes admitted that these people may not in fact have received the catalogs. (J.A. 76) Indeed, Holmes did not know whether the intended recipients still lived at the addresses to which the catalogs were mailed by Holmes. (J.A. 89)

Holmes' catalogs are designed in New York City and then printed for Holmes at one of three locations, Atlanta, Boston or Oklahoma City. (J.A. 80) None of these catalogs were printed in Louisiana. (J.A. 80) They could have been printed in Louisiana; however, Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere. (J.A. 97) During the taxable period Holmes published nineteen catalogs, four in 1979, six in 1980 and nine in 1981. (J.A. 80) Eighty-two percent of these catalogs were sent by Holmes to targeted Louisiana residents who were selected by Holmes' Sales Promotion Manager. (J.A. 71, 81) These intended recipients were all of the Holmes' charge customers. (J.A. 89) No taxes were paid to New York on these catalogs, nor to Atlanta, Boston or Oklahoma City. (J.A. 69, 85, 86) Unlike Louisiana, these jur-

isdictions do not levy a sales tax on the publishing or printing of catalogs. (J.A. 54, 86)

Having learned from a routine audit that the cost of these catalogs by taxable year was: 1979=$520,000; 1980=$670,000; and 1981=$834,000 (J.A. 85), and that no sales tax had been paid on the catalogs, the Department of Revenue and Taxation for the State of Louisiana proposed to assess Holmes for a compensating "use tax" pursuant to Louisiana Revised Statute 47:301, *et seq.* (J.A. 67) Holmes refused to pay the tax, and this suit was brought for its recovery. (J.A. 2-10) The parties stipulated at trial that the use tax on the catalogs would be $43,937.03 together with statutory interest and attorney fees on the aggregate thereof.[1]

Judgments and Opinions Below

Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana ("Louisiana") brought this action in the Civil District Court for the Parish of Orleans, located in New Orleans, Louisiana, against D. H. Holmes Company, Ltd., a Louisiana corporation, for the collection of use taxes relating to catalogs which were purchased by, and both designed and printed for, Holmes. These catalogs were printed in states that levied neither an applicable sales nor a use tax. Holmes then caused these catalogs to be mailed from the printing situs to Louisiana addressees who were targeted and selected by Holmes to receive these catalogs.

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[1] This action initially involved a candy sales tax issue, which was resolved at the trial level.

In opposing this suit, Holmes asserted a Commerce Clause constitutional challenge to the imposition of a compensating use tax on these catalogs.

In its Reasons for Judgment the trial court held that (1) Holmes had sufficient possession of the catalogs to warrant the imposition of the tax, (2) the distribution of the catalogs was intended for the use of Holmes in increasing its sales to potential customers who were residents of Louisiana, and (3) once the catalogs reached the residences of the prospective customers to whom they were addressed, Louisiana taxing authority reaches the resting place of the catalogs. In dismissing the constitutional challenge, the court cited cases from this Court and Louisiana appellate courts. The court found that the Use Tax Statute met the four-prong test enunciated by the Court. The trial court's judgment and reasons therefor are reproduced in the Appendix to the Jurisdictional Statement at pages 12A-22A. They are unreported.

Holmes appealed to the Louisiana Fourth Circuit Court of Appeal. The appellate court agreed that the facts of this case met the four-prong Commerce Clause test, citing cases decided by this Court and Louisiana appellate courts. It also expressly found that Holmes purchased these catalogs out of state and paid for their mailing in order to further Holmes' sales and that the catalogs at the time of taxation were not a part of Interstate Commerce, for they had come to rest in Louisiana. Further, by causing the catalogs to be distributed in Louisiana, Holmes was liable for the Use Tax applicable to the value of the catalogs determined by their cost. The opinion of the state appellate court is reproduced in the Appendix

to the Jurisdictional Statement at pages 2A-10A. It is reported as *McNamara v. D. H. Holmes Company, Ltd.*, 505 So.2d 102 (La. App. 4 Cir. 1987).

After the Louisiana Supreme Court denied writs of certiorari, Holmes appealed to this Court where probable jurisdiction was noted on November 2, 1987. — U.S. —, 108 S.Ct. 283, 98 L Ed 2d 244 (1987).

Recent Amendment to Louisiana Law

Although cognizant that the Question Presented in Holmes' brief eliminates a claim concerning Holmes' constitutional challenge to R.S. 47:305(E) as had been asserted in the Question Presented in Holmes' Jurisdictional Statement, Louisiana deems it appropriate to advise the Court of a recent amendment to R.S. 47:305(E), *see Fusari v. Steinberg*, 419 U.S. 379, 387 n. 12 (1975).

By Acts No. 156 of 1987, effective September 1, 1987, R.S. 47:305(E) was amended and reenacted so as to include the following language:

> . . . [H]owever, nothing herein shall prevent the collection of the taxes due on sales of tangible personal property into this state which are promoted through the use of catalogs and other means of sales promotion and for which federal legislation or federal jurisprudence enables the enforcement of this Chapter upon the conduct of such business.

As amended and reenacted, said Section now reads:

> E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce; however, nothing herein shall prevent the collection of the taxes due on sales of tangible personal property into this state which are promoted through the use of catalogs and other means of sales promotion and for which federal legislation or federal jurisprudence enables the enforcement of this Chapter upon the conduct of such business. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

R.S. 47:305(E). This amendment was in anticipation of action by the Court or Congress concerning the Court's decision in *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). Congress has before it five bills relating to the issues decided by the Court in *National Bellas Hess*. In the House they are Nos. HR 1642, HR 1891, and HR 3521. In the Senate the bills are Nos. S 639 and S 1099.

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SUMMARY OF THE ARGUMENT

The first part of the argument reviews the underlying reasons why the courts below found as a matter of law and fact that Holmes owned the catalogs and that the operating incidence of the use tax was the distribution by Holmes of their catalogs.

The trial court found that Holmes had purchased these catalogs and that Holmes owed them. (J.A. 88-89) Holmes attempted to show that it did not physically possess the catalogs, except for 1,000 received at the store.

In Louisiana, however, a person may be the owner of tangible personal property without possessing the property. L.C.C. Art. 481. This ownership, if transferred by gift, remains the property of the donor until it is accepted by the donee. L.C.C. Arts. 1467, 1468, 1540 and 1543. Thus, ownership of the catalog by Holmes continued until Holmes' gifts of the catalogs were accepted by their unsuspecting addressees.

As owner of the catalogs under Louisiana law Holmes is a dealer who imports or causes to be imported tangible personal property for distribution. R.S. 47:301(4). As a result of its distribution of these catalogs, Holmes is liable for the use tax. R.S. 47:301(19) as imposed by R.S. 47:302 A(2) and R.S. 47:321 A(2). As the appellate court below held, "after the catalogs were in Louisiana mail boxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *McNamara v. D.H. Holmes Company, Ltd.*, 505 So.2d 102, 105 (La. App. 4 Cir. 1987). This Court has held that state law determines the operating incidence of a tax. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952).

The second part of the argument shows that this tax is valid under the Commerce Clause. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court enunciated a four-prong test for determining whether a state tax violates the Commerce Clause, holding that "[W]e note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax,

or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Id.* at 287. In this case Louisiana has shown that the use tax as levied on Holmes' catalogs meets each of the four prongs of the test enunciated in *Complete Auto*:

(1) Nexus—Holmes owns 13 store locations throughout Louisiana, with 5,000 employees, 500,000 charge customers and 1,000,000 to 1,500,000 other customers. (J.A. 68-69) Holmes' annual sales for the taxable years were: 1979—$159,745,000.00; 1980—$176,548,000.00; and 1981—$197,320,000.00. (J.A. 98) Its income, for the same years before taxes, was: 1979—$6,350,000.00; 1980—$9,061,000.00; and 1981—$8,206,000.00. (J.A. 98)

Holmes distributes its catalogs to each of its 500,000 charge customers, 82% (or 410,000) of which are in Louisiana. (J.A. 89, 80) During the taxable period the number of catalogs distributed was: 1979—four; 1980—six; and 1981—nine. (J.A. 80) Thus, with 410,000 charge customers being given nineteen catalogs in these three years, the total distribution by Holmes would be 7,790,000 catalogs within Louisiana.

(2) Discrimination—There is no discrimination as to interstate commerce, for the sales tax payable on the purchase of tangible personal property is equal to the use tax applicable to the same tangible personal property. R.S. 47:302, 321.

(3) Apportionment—The tax is fairly apportioned for no sales tax was paid where the catalogs were designed and printed. (J.A. 69, 85, 86) Had such a sales tax been paid, Louisiana would have granted a credit against the

use tax for the sales tax paid elsewhere. R.S. 47:301 A (2), 303 A and 321 A (2).

(4) Services—The services provided by Louisiana in relation to the tax were not at issue, for Holmes has admitted the substantiality of the services. (J.A. 42, 51, Holmes' brief page 26.) Substantiality of the services is also reflected in the testimony as reproduced at J.A. 41-52. Plaintiff's Exhibit No. 1 reproduced at J.A. 20-34, Admitted, T.R. 52.

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ARGUMENT

The Louisiana State Court Determination As To The Taxation Incidence Should Be Upheld

Louisiana imposes a use tax on tangible personal property wnich a dealer, such as Holmes, imports or causes to be imported into Louisiana for use, consumption, distribution and storage for use or consumption within Louisiana, provided there is no duplication of the tax (whether in Louisiana or elsewhere). R.S. 47:301, (4) and (19), 302 A (2), 303 A and 321 A (2). It is a compensating tax in that the use tax rate is exactly the same as that for sales tax. R.S. 47:302 A (1) and (2), 321 A (1) and (2).

Just last term, the Court discussed the interrelationship between a sales tax and a compensating use tax in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. —, 97 L Ed 2d 199, 107 S.Ct. 2810 (1987):

> We upheld the tax because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax had already been paid,[13] regardless of whether the sales tax had been paid to Washington or to another State.[14] As we explained in Halliburton Oil Well Cementing Co. v. Reily, 373 US 64, 70 (1963):
>
> > "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

13. Many States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereignties have jurisdiction to tax parts of the same chain of commercial events. For example, the District of Columbia and all but three States with sales and use taxes provide a credit against their own use taxes for sales taxes paid to another State, although reciprocity may be required. See CCH State Tax Guide 6013-6014 (1986); Williams v. Vermont, 472 US 14, 22 (1985). See also Halliburton Oil Well Cementing Co. v. Reily, 373 US 64 (1963).

14. In his opinion for the Court in Henneford v. Silas Mason Co., Justice Cardozo carefully described the relationship between the 2% "tax on retail sales" imposed by Title III of Washington's 1935 tax code and the "compensating tax" imposed by Title IV on the privilege of use. The compensating use tax was imposed on the use of an article of tangible personal property which had been purchased at retail but had not been subjected to a sales tax that was equal to or in excess of that imposed by the State of Washington. If the rate of the tax imposed by another jurisdiction was less than 2%, the rate of compensating tax was measured by the difference. Explaining why

such a compensating tax does not discriminate against interstate commerce, Justice Cardozo wrote:

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. *It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there.* No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." 300 US, at 583-584 (emphasis added).

Id, at 97 L Ed 2d 199, 212-13.

A similar comparison has recently been made in an article by Professors Nowak and Rotunda:

> Use taxes on tangible personal property have two justifications. First, a use tax compensates the state for providing state law protection for the property's use in the state. Thus regarded, a use tax is a type of one-time property tax. In essence, the state imposes an initial fee for state protection of the person's ownership and use of the property. * * *
>
> The second justification for a use tax is that it compensates the state for the losses of sales tax revenue occasioned by in-state persons traveling to other states to make purchases of products that they will then use in the use tax state. The compensating use tax is an adjunct to the sales tax. The use tax rate will be the same as the sales tax rate. A person will not have to pay both a sales tax and a use tax on the same item to the same state if the use tax is only a compensating use tax. The use tax compensates the state for the loss of the sales tax.

Nowak & Rotunda, "Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and The Useless Multiple Tax Concept," 20 *U. C. Davis Law Review* 273, 278 (1987).

Louisiana learned through a routine audit that Holmes had caused catalogs to be designed and printed out-of-state and then imported in Louisiana for distribution to Holmes' customers. Because Holmes had not paid a sales tax to these out-of-state jurisdictions, Louisiana advised Holmes that Holmes should have reported and paid a use tax to Louisiana. Holmes refused payment, and this action was instituted.

There was no dispute as to most of the basic facts, i.e., the purchase by Holmes of the catalogs without the payment of sales tax; the importation by Holmes of the catalogs for distribution by Holmes to Holmes' designated customers; and the applicable tax, interest and attorney fees if judgment was ultimately entered against Holmes.

Holmes' position was that, except for 1,000 sent direct to the store, these catalogs were never under Holmes' possession or control in Louisiana and that the Commerce Clause grants Holmes immunity from taxation on these catalogs while they are in interstate commerce.

Louisiana's position was that Holmes owned these catalogs from the time of their purchase, through the time of Holmes' transfer of the ownership of the catalogs by gift to Holmes' designated recipient, and that under Louisiana law the gift was not completed until the ownership of the catalags was agreed upon and accepted by the designated recipient. L.C.C. Art. 1540. Holmes thus owned these catalogs:

> during the New York design process;
>
> during the Atlanta, Boston or Oklahoma printing process;
>
> during the mailing process;
>
> at the time they came to rest in Louisiana by placement into the unsuspecting recipient's mail or post office box; and
>
> until the designated recipient accepted the catalog.

Despite Louisiana's civil codal provision, L.C.C. Art. 481, that the ownership and the possession of a thing are distinct, Holmes attempted to equate ownership with possession. (J.A. 87, 88) The courts below concluded otherwise.

As to ownership, possession and control, three witnesses testified during the trial, Mr. Roy C. Bradley, the Director of Sales Tax, Department of Revenue and Taxation, State of Louisiana, whose testimony appears at J.A. 54-66, Mr. Paul R. Falter, Vice President/Treasurer Controller for Holmes, whose testimony appears at J.A. 67-79, and Mr. Stewart Gahn, the Sales Promotion Director for Holmes, whose testimony appears at J.A. 79-93.

Mr. Bradley was called under cross-examination by Holmes. Holmes elicited the following testimony:

Use taxes were levied on Holmes as "a dealer who imports or causes to be imported tangible personal property into the State [of Louisiana] for use and distribution in the State" (J.A. 56), *citing* R.S. 47:302;

Holmes has the right or power to direct the catalogs' distribution (J.A. 56);

The incidence of ownership by Holmes was that Holmes caused the catalogs to be imported into the state for Holmes' use, for the furtherance of its business and thereafter delivered to its customers and that the use made by Holmes was to promote the sale of its articles (J.A. 57);

Holmes purchases catalogs and causes them to be imported into Louisiana (J.A. 57);

The catalogs come to rest in Louisiana when they are placed in a mail box and the catalogs, while in the mail, are not in the physical possession of Holmes (J.A. 59);

Holmes controls the delivery of the catalogs in that Holmes determines to whom the catalogs would be delivered (J.A. 60);

Holmes could contact the Postal Service in event of error and prevent distribution (J.A. 61); *see* Domestic Mail Manual 152.7, made a part of the Postal Regulations by 39 C.F.R. 111.1;

Holmes continues to own each catalog until the addressee picks it up and accepts it, because Holmes purchased the catalogs and directed their delivery (J.A. 61);

The catalogs are taxed at their cost to Holmes (J.A. 64); and

That a customer does not own a catalog until he accepts it (J.A. 64); *see* L.C.C. Art. 1540 which provides that donations are effective from the date of acceptance, and L.C.C. Art. 1543 which provides that the acceptance must be made by the donee personally or by his attorney in fact.

Both Bradley and the Treasurer of D.H. Holmes, Paul R. Falter, testified that if undelivered, the catalogs are returned to Holmes (J.A. 57, 73). *See* return address on Plaintiff's Exhibit 6 (J.A. 39).

Paul R. Falter, the Treasurer of D. H. Holmes, and Stewart Gahn, Sales Promotional Director of Holmes, also testified during the trial. Mr. Falter testified that the catalogs are "[p]rinted for a purpose of attempting to secure business," and that they do in fact secure business for Holmes. (J.A. 71) Catalogs also help to keep Holmes' name in front of the public. (J.A. 72) Mr. Falter testified that Mr. Gahn determines how a shipment of catalogs will be made as well as the method by which catalogs leave the printer and arrive at their designated address (J.A. 74), and that Holmes determines the addressees for the catalogs. (J.A. 74) Mr. Gahn testified that the catalogs are addressed to Holmes' active charge account customers. (J.A. 86) Mr. Gahn also testified that the catalog states, "Postal carrier, if no one, if the recipient has moved, please leave this with the current resident." (J.A. 75) (Plaintiff's Exhibit 6 J.A. 39) Mr. Gahn admitted that Holmes does not even know if a catalog's addressee still lives at that address when the catalogs are shipped. (J.A. 89)

Both Holmes officials also testified about the method of payment by Holmes for the catalogs. Mr. Falter testified that Holmes pays a portion of the printing charge beforehand, and the rest afterwards. (J.A. 74) Mr. Gahn testified that Holmes pays for the postage on the catalogs directly to the Postal Service under its annual bulk rate. (J.A. 86)

When asked whether Holmes owned the catalog, Mr. Gahn kept stating that Holmes was not in physical possession of the catalog, except for the 1,000 sent directly to the store. (J.A. 87, 88) Finally the court intervened:

> Q. So I understand what happens to them, I'm interested in Holmes' belief as to the ownership of them.
>
> MR. GRACE: Your Honor, again, that calls for a legal conclusion and I think that to some extent Mr. Pugh is arguing with the witness. The question has been asked and answered two times.
>
> MR. PUGH: I think we've spent about a half hour this morning talking about this very same thing with the Revenue Department as to who owned them, your Honor.
>
> THE COURT: Well you know, I think this witness is just flirting around an answer. I think deep down inside he knows that Holmes purchased something for some money and that Holmes doesn't just give away its money.
>
> THE WITNESS: Oh, no.
>
> THE COURT: They purchased these, I assume they did pay. They bought them?
>
> THE WITNESS: Yes.
>
> THE COURT: They bought them from a printer or from a company a certain product?

THE WITNESS. Yes.

THE COURT: Yes. And when you buy something you own it, so, you know, I didn't think that that is causing us too much of a problem. As a matter of fact, I would suspect that counsel would stipulate that at some point Holmes owned these catalogs, but let's move on because no need to—

(J.A. 88-89)

The court also asked Mr. Gahn questions as to what Holmes could do in the event of damage to the catalogs or upon discovery of errors printed in the catalogs. (J.A. 91-93) Mr. Gahn was unable to answer either of these questions. The Postal Regulations make clear that Holmes as the owner of the catalogs has a right under 39 C.F.R. 281 and 39 C.F.R. 912 to collect damages from the postal service, and further has a right under 39 C.F.R. 111.1 in conjunction with Domestic Mail Manual 152.7 to recall the catalogs for any reason, including errors printed therein, merely by filing Form 1509, provided free by the postal service.

Holmes has altered its Question Presented, as between Holmes' Jurisdictional Statement and Holmes' Brief (a) by eliminating a claim that La. Rev. Statute 47:305(E), as applied, is violative of the Commerce Clause; and (b) by eliminating its claim that Appellant was without any proprietary interest in the catalogs while located in the State of Louisiana:

JURISDICTIONAL STATEMENT
QUESTION PRESENTED

Holmes submitted the following QUESTION PRESENTED in its Jurisdictional Statement Page i:

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. Sections 47:302(A)(2), 47:305(E) and 47:321(A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

BRIEF
QUESTION PRESENTED

Holmes submitted the following QUESTION PRESENTED in its Brief Page (i):

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. 47:302(A)(2) and 47:321(A), are violative of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, as assessing directly against appellant an impermissible tax on merchandise catalogs sent in interstate commerce via the United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, free of charge to the recipients, where appellant lacked possession or control over the catalogs in Louisiana, both while the catalogs were in interstate commerce, including the time they were in the recipients' mailboxes, and after they came to rest in the hands of the Louisiana recipients.

Thus, Holmes has abandoned those arguments:

> A question set forth in a petition or jurisdictional statement will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted. See Travelers Health Assn. v. Virginia, 339 U.S. 643, 651 n.4 (1950); Russell v. United States, 369 U.S. 749, 754 n.7 (1962).

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 553 (6th ed. 1986).

Holmes does not attempt to argue that it did not own the catalogs pursuant to Louisiana law. Instead, Holmes argues on page 29 of its brief that "United States law . . . confirms that Holmes can have no real ownership . . . " of the catalogs in Louisiana. No federal law of ownership is ever cited for this astounding proposition. Ownership in Louisiana for Louisiana tax purposes is a question of Louisiana law. Indeed, Holmes in effect admits that state law controls ownership by citing a Wisconsin decision holding that under Wisconsin law catalogs remained the property of the printer until delivered to the recipient. *Wisconsin Department of Revenue v. J. C. Penney Co., Inc.*, 323 N.W.2d 168, 170 (1982).

As to ownership of the catalogs, Holmes in brief never discusses the Louisiana law relative to ownership and its transfer by gift, L.C.C. Arts. 481, 1467, 1468, 1540 and 1543. Nor does Holmes attempt to discuss the decisions of the Court to support the right of a state to levy a tax on less than all of the attributes of ownership. "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Company*, 300 U.S. 577, 582 (1937). "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. (citations omitted) The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all." (Citation omitted) *Id.* at 587-88. "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 268 (1933).

In assessing the law of Louisiana as to the facts presented, the courts below concluded that the incidence of the tax was on the distribution of the catalogs. In suggesting that this finding as to both fact and law by the Court of Appeal, Fourth Circuit, State of Louisiana, should be accepted by the Court, Louisiana relies on the decisions of the Court that "the State may determine for itself the operating incidence of its tax. But, it is for this Court to determine whether the tax, as construed by the highest court of the state is or is not 'a tax on interstate commerce.' " *Colonial Pipeline v. Traigle*, 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952); that "[T]his Court usually has deferred to the interpretation placed on a state tax statute by the highest court of its State." *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973), *citing Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960) and *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335, 337 (1944); that "[T]he application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here." *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960), *citing General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335 (1944); that "[W]hen a state court has made its own definite determination as to the operating incidence, our task is simplified. We give the finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965); that "ordinarily the construction given to a state statute by the states' highest court capable of deciding the question is taken as binding on this Court." (citations omitted)

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Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 351 n.20 (1949); that "[W]e are bound by the construction of the statute by the state court." *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87 n.4 (1948); that "[t]he rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts." *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs of Montana*, 332 U.S. 495, 499-500 (1947); and that "[s]tate courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so judging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal constitution that we have power to protect or enforce the federal rights." *Greenough v. Tax Assessors of the City of Newport*, 331 U.S. 486, 497 (1947).

While acknowledging that the Court certainly determines the applicability of constitutional law to constitutional facts, Louisiana asserts that it is the responsibility of Louisiana's state courts to determine the ownership, donative transfer and taxable incidence relative to the catalogs.

Louisiana's Use Tax, As Applied To Holmes, Is Not Violative Of The Commerce Clause

Since the laying of its keel, with rare, but occasional exceptions, in the area of state taxation, the Commerce Clause has been adrift in an uncharted sea with "little in the way of precise guides to the States in the exercise of their indisputable power of taxation," *Northwestern*

States Portland Cement Co. v. State of Minnesota, 358 U.S. 450 (1959), until recently, when the Court began mapping a course for the states to follow in the legislative drafting and judicial application of their tax laws so that they would pass constitutional muster.

Another Louisiana case, *Colonial Pipeline Company v. Traigle*, 421 U.S. 100 (1975), provides as good a starting point as any concerning the Court's recent teachings concerning Commerce Clause challenges to state taxes. The Court grouped together the holdings of past cases in finding as follows:

> It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. Accordingly, decisions of this Court, particularly during recent decades, have sustained nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return. General Motors Corp. v. Washington, 377 U.S. 436 (1964) states the controlling test:
>
> > "[T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the op-

> portunities and protections which the State has afforded. . . . As was said in Wisconsin v. J. C. Penney Co., 311 US 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'"

Id. at 108-09.

A year later the Court in handing down a compensating use tax held:

> Equal treatment of interstate commerce, lacking in § 270-a, has been the common theme running through the cases in which this Court has sustained "compensating," state use taxes. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of-state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system was nondiscriminatory treatment of in-state and out-of-state purchases:
>
> > "Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local." Id., at 584.

A similar use-sales-tax structure was sustained in General Trading Co. v. Tax Comm'n, 322 US 335 (1944), because the "tax [was] what it professes to be —a nondiscriminatory excise laid on all personal

> property" regardless of where the sale was made. Id., at 338. See also International Harvester Co. v. Department of Treasury, 322 US 340 (1944); Alaska v. Arctic Maid, 366 US 199, 204 (1961). In all the use-tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax of the same amount. The taxes treated both transactions in the same manner.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 331-32 (1977).

The Court the same year created definitive guidelines to be followed in assessing state taxes when Commerce Clause objections are raised. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court held: "[W]e now reject the rule of Spector Motor Service, Inc. v. O'Connor, that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled." *Id.* at 288-89. By its holding that "[W]e note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned" *id.* at 287, the Court adopted a four-prong test for assessing the Commerce Clause validity of a state tax.

Less than a month following its decision in *Complete Auto* the Court decided the case of *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). In *National Geographic* the Court refined the

four-prong test. Regarding the collection of use taxes the important relationship is not that between the state and the specific activity for which the respondent is collecting taxes, but rather the relationship or nexus between the state and the taxpayer's overall activities within the taxing state which allows imposition of the duty to collect taxes:

> The Society argues in other words that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree. However fatal to a direct tax a "showing that particular transactions are dissociated from the local business," Norton Co. v. Illinois Rev. Dept., 340 U.S. 534, 537, Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

Id. at 560.

In this case Louisiana has shown that the use tax as levied on Holmes' catalogs meets each of the four prongs of the test enunciated in *Complete Auto:*

(1) Nexus—Holmes' connection, or nexus, with Louisiana will in four years reach its sesquicentennial mark. (J.A. 57) Holmes has established a preeminent status as a Louisiana based mercantile business, for it owns 13 store locations throughout Louisiana, with 5,000 employees, 500,000 charge customers and 1,000,000 to 1,500,000 other customers. (J.A. 68-69) Holmes' annual sales for the taxable years were: 1979—$159,745,000.00; 1980—$176,548,000.00; and 1981—$197,320,000.00. (J.A. 98) Its income, for the same years before taxes, was: 1979—$6,350,000.00; 1980—$9,061,000.00; and 1981—$8,206,000.00. (J.A. 98)

Holmes distributes its catalogs to each of its 500,000 charge customers, 82% (or 410,000) of which are in Louisiana. (J.A. 89, 80) During the taxable period the number of catalogs distributed was: 1979—four; 1980—six; and 1981—nine. (J.A. 80) Thus, with 410,000 charge customers being given nineteen catalogs in these three years, the total distribution by Holmes would be 7,790,000 catalogs within Louisiana.

Holmes should not be given a home-town advantage of a dweller within and at the same time expect the benefits of a stranger from afar. As the Court held in *Norton Company v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951):

> Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.

Id. at 538-39 (Citation omitted); *see also General Motors Corporation v. Washington*, 377 U.S. 436, 440-41 (1964) (drawing distinction between taxation based upon the activities of non-domiciliary taxpayers as compared to domiciliary taxpayers (such as Holmes)).

The nexus present here is much more substantial than that present in other cases in which this Court has upheld a state tax as valid under the Commerce Clause. In *Na-*

tional Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), National Geographic had only two offices in California, both of which solicited advertising copy for a monthly magazine. Neither office performed any activities related to a mail-order business also conducted by National Geographic. Nonetheless, National Geographic was required to collect use tax. Last term this Court held that solicitation by an independent contractor constitued "a sufficient nexus" to levy taxation. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. —, 97 L Ed 2d 199, 215, 107 S.Ct. 2810 (1987). The Court cited approvingly the statement of the Washington Supreme Court that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 215-16. Here the Sales Promotion Manager of Holmes testified that the catalogs are "[p]rinted for a purpose of attempting to secure business," and that they do in fact secure business for Holmes. (J.A. 71) Catalogs also help to keep Holmes' name in front of the public. (J.A. 72) He further testified:

> Q: In other words, the catalog is used for more than catalog sales, it's to encourage people to use D.H. Holmes?
>
> A: Yes.
>
> (J.A. 73)

(2) There is no discrimination as to interstate commerce, for the sales tax payable on the purchase of tangible personal property is equal to the use tax applicable to the

same tangible personal property. R.S. 47:302 A, 321 A. As the Court held in *International Harvester Company v. Department of Treasury of the State of Indiana*, 322 U.S. 340 (1944):

> We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Id. at 349 (citations omitted).

(3) The tax is fairly apportioned for no sales tax was paid where the catalogs were designed and printed. (J.A. 69, 85, 86) Had such a sales tax been paid Louisiana would have granted a credit against the use tax for the sales tax paid elsewhere. R.S. 47:301 A(2), 303 A and 321 A(2).

(4) The services provided by Louisiana in relation to the tax were not at issue, for Holmes has admitted the substantiality of the services. (J.A. 42, 51. Holmes' brief page 26) Substantiality of the services is also reflected in the testimony as reproduced at J.A. 41-52. Plaintiff's Exhibit No. 1 reproduced at J.A. 20-34, Admitted, T. R. 52.

Holmes argues that this four-prong test does not apply because this Court has not applied the test where the question involves a direct tax on goods while still in the course of interstate commerce. Of course, the courts below found that the incidence of the tax occurred after the interstate journey was at an end. Determination of the operating incidence is a state law question. *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone,* 342 U.S. 389, 392 (1952).

Holmes' argument is nothing more than an attempt to convince this Court to again rely on formalistic labels and turn its back on its expressed goal of "establish[ing] a consistent and rational method of inquiry focusing on 'the practical effect of a challenged tax.'" *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 615 (1981), *quoting Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443 (1980). Since its formulation in *Complete Auto Transit,* the four-prong test has been used to determine the validity of business and occupational taxes, *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978); taxation of income received by a corporation from its subsidiaries, *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443 (1980); use taxes, *Maryland v. Louisiana,* 451 U.S. 725, 754 (1981); severance taxes, *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617 (1981); highway taxes, *American Trucking Associates v. Scheiner,* 483

U.S. —, 97 L Ed 2d 226, 250, 107 S. Ct. 2829 (1987); and sales taxes, *Wardair Canada, Inc. v. Florida Department of Revenue,* 477 U.S. 1, —, 91 L Ed 2d 1, 10, 106 S. Ct. 2369 (1986). Although invalidating an ad valorem tax as applied to foreign commerce in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), the Court commented that "[w]e may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, *Complete Auto* would apply and be satisfied, and our Commerce Clause inquiry would be at an end." *Id.* at 446. Certainly, the four-prong test found applicable in every other state tax case since *Complete Auto* also governs determination of this use tax case.

Due Process Claim

American Retail Foundation and Direct Marketing Association have each in their amicus curiae briefs attempted to bootstrap an additional constitutional issue, Due Process. Such a claim has not heretofore been before the courts in this case. Space limitations preclude a comprehensive reply to their arguments. Without conceding its applicability in this case, as a precautionary measure only, Louisiana has shown the Due Process Clause as being one of the Constitutional Statutory and Regulatory Provisions and if argument is deemed necessary, or appropriate, Louisiana relies on Louisiana's Commerce Clause arguments. The Court has noted the close relationship between the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. *See National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois,* 386 U.S. 753 at 756 (1967); *see also Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, at 226-28 (1980); *see also*

Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 350 (1982) ("Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause." (O'Connor, J., dissenting))

———o———

CONCLUSION

In fine, Holmes distributes catalogs to its customers to encourage the sale of its articles of merchandise. Holmes may, by choice, either arrange for the printing of these catalogs in the State of Louisiana in which event Holmes pays the applicable sales tax due to the State of Louisiana, or arrange for the printing of these catalogs in states other than Louisiana in which event a sales tax would be due and payable to the taxing jurisdiction where printed. If the sales tax in that jurisdiction is less than the sales tax would have been had the printing occurred in Louisiana, then Holmes would be liable to Louisiana for the difference as a compensating use tax. If Holmes has the catalogs sent direct to Holmes' stores, as it did with the 1,000 catalogs, and then distributed the catalogs from these stores, then, as the owner of the catalogs with "possession," Holmes pays to Louisiana the compensating use tax on these catalogs. This is because Holmes is a dealer who imports, or causes to be imported, these catalogs for distribution. R.S. 47:301, 302 A(2), 303 A and 321 A(2). Holmes, by choice, wants to be sure that these same catalogs are distributed to Holmes' customers timely in connection with Holmes' purpose for having the catalogs printed, instead of hoping that all of its 500,000

charge customers will timely pick up the catalogs in the stores. Therefore, Holmes uses the United States Mail as a conduit for the pre-sale timely delivery of the catalogs. Holmes can mail them from its Louisiana stores or mail them from the printing situs. The manner of the catalog's distribution would be the same. Holmes, however, says, but no, if we don't touch the catalogs, we don't possess them, and we don't have to pay a tax on the catalogs.

The trial court put its finger on the matter:

> THE COURT: The other thing is, does D.H. Holmes have a right to or any of the department stores, have a right to circumvent the laws of the State by having its catalogs printed out of state and shipped from out of state? Would a person, if they decided that they were going to let Edward Printing Company, which is a local printing company, do their catalogs and mail them, would that be subject to tax?
>
> MR. RINKER: Yes, it would, your Honor, there's no question. As a matter of fact, the cases that we cited discussed the distinction between those two possibilities saying that if you print them in the State you pay the taxes and if you buy them from out of state, you don't pay the taxes.
>
> THE COURT: So, you're saying then in effect, in answer to my other question, that Holmes has control over whether taxes are due on certain items and not the legislature of the State of Louisiana?
>
> MR. RINKER: To some extent, that's correct.

(J.A. 97)

Whether the catalogs were printed for Holmes by a Louisiana printer, such as Edward Printing Company, or an out-of-state printer, the product is the same—a catalog;

Holmes' objective in having the catalogs printed is the same—distribution to its charge customers;

The timeliness with which Holmes desires to have the catalogs delivered is the same, regardless of the point of origin whether within or without Louisiana—by the United States Mail;

If the catalogs are destroyed in the mail, the remedy is the same—a claim for damages;

If the catalogs are misprinted the solution is the same—their recall from the postal service;

And, most importantly, the intended recipient is the same—the Louisiana resident.

As Justice Cardozo stated in the "granddaddy" of use tax cases, "The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937).

The judgment of the Court of Appeals should be affirmed.

All the above and foregoing is thus respectfully submitted.

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February 8th, 1988

APPENDIX

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section 8, clause 3

["Commerce Clause"]

The Congress shall have the power . . .

3. To regulate Commerce . . . among the several states, . . .

Fourteenth Amendment, Section 1, clause 3

["Due Process Clause"]

• • • • nor shall any State deprive any person of life, liberty, or property, without due process of law; • • • •

Louisiana Revised Statutes

R.S. 47:301 Definitions

(4) "Dealer" is further defined to mean:

(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined.

R.S. 47:302 Imposition of tax

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of

each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

R.S. 47:303 Collection

A. *Collection from dealer.* The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign countries, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible

personal property in another state. The credit provided herein shall be granted only in the case where the state to which a similar tax has been paid grants a similar credit as provided herein, provided that members of the armed forces who are citizens of this state and whose orders or enlistment contracts stipulate a period of active duty of two years or more and who purchase automobiles outside of the state of Louisiana while on such tour of active duty shall be granted such credit in connection with the purchase of such automobiles whether or not the state to which such tax thereon has been paid grants a similar credit as herein provided. The proof of payment of a similar tax to another state shall be made according to rules and regulations promulgated by the collector of revenue. In no event shall the credit be greater than the tax imposed by Louisiana upon the particular tangible personal property which is the subject of the Louisiana use tax.

R.S. 47:321 Imposition of (additional sales) tax

A. In addition to the tax levied by R.S. 47:302(A) provisions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, . . . the levy of said tax to be as follows:

(1) At the rate of one percent of the sales price of each item or article of tangible personal property when sold at retail in this state, the tax to be computed on gross sales for the purpose of remitting the amount of tax to the state, and to include each and every retail sale.

(2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this

state, provided that there shall be no duplication of the tax.

Louisiana Civil Code

L.C.C. Art. 481[1] Ownership and possession distinguished

The ownership and the possession of a thing are distinct.

Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor.

COMMENTS

The Comments relating to Article 481 state:

(a) This provision reproduces the substance of Article 496 of the Louisiana Civil Code of 1870. It does not change the law.

(b) There are no corresponding provisions in modern civil codes or in the French Civil Code. Article

---

[1] During one of the taxable years at issue, 1979, this Article was numbered 496 and read:

The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such act, or even because another performs such acts without the knowledge or against the will of the owner.

But the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription.

Titles I, II and III of Book II of the Louisiana Civil Code were extensively revised by the 1976, 1978 and 1979 Legislatures. These revisions, which encompass C.C. arts. 448 to 645 and replace former C.C. arts 448 to 645 of the Civil Code of 1870, were made on recommendation of the Louisiana State Law Institute.

496 of the Louisiana Civil Code of 1870 derives from the 1825 revision. The redactors observed: "The principle developed in this article is necessary in order to show that the right of ownership can be preserved without the exercise of any act of ownership, and without any actual possession on the part of the owner. Digest Book 41, title 2, law 22, Sec. 1, and Toullier, lois civiles, vol. 3, No. 82, p. 68." 1 Louisiana Legal Archives, Projet of the Louisiana Civil Code of 1825, p. 44 (1937).

L.C.C. Art. 1467 Methods of acquiring or disposing gratuitously

Property can neither be acquired nor disposed of gratuitously, unless by donations *inter vivos* or *mortis causa,* made in the forms hereafter established.

L.C.C. Art. 1468 Donation inter vivos, definition

A donation *inter vivos* (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it.

L.C.C. Art. 1540 Donations effective from date of acceptance

A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms.

The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have the effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance.

L.C.C. Art. 1543 Acceptance during life of donee

The acceptance can only be made by the donee personally, or by his attorney in fact during his life. If he refuse or neglect to accept, his creditors can not accept it in his stead, under the pretext that the refusal has been in fraud of their rights.

Code of Federal Regulations

39 C.F.R. § 111—General Information on Postal Services

§ 111.1 Domestic Mail Manual; incorporation by reference of regulations governing domestic mail services.

Section 552(a) of Title 5, U.S.C., relating to the public information requirements of the Administrative Procedure Act, provides in pertinent part that "* * * matter reasonably available to the class of persons affected thereby is deemed published in the FEDERAL REGISTER when incorporated by reference therein with the approval of the Director of the Federal Register." In conformity with that provision, and with 39 U.S.C. section 410(b)(1), and as provided in this part, the U.S. Postal Service hereby incorporates by reference in this part, the Domestic Mail Manual, a looseleaf publication published and maintained by the U.S. Postal Service, Washington, D.C. 202[illegible].

Domestic Mail Manual

152 Mail Deposit and Collection

152.7 Recall of Mail

.71 Who May Recall Mail. Mail deposited in a collection box or post office may be recalled on proper identification by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind who sent the mail. Form 1509. *Sender's Application for Recall of Mail,* which may be obtained at any post office, must be submitted to the postmaster at the office of mailing. After processing, these applications and all related papers must be filed at the office of mailing.

39 C.F.R. § 281 Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophes

§ 281.1 Notification of firm mailers.

Whenever bulk firm mail shipments are involved in transportation accidents or catastrophes, such as train or highway accidents, fire, flood, etc., it will be the responsibility of the sectional center director of customer services at the office of mailing to give known mailers timely notification of the incident and its effect on their mail shipment(s).

39 C.F.R. § 912 Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

§ 912.5 Administrative claim; when presented

(a) For purposes of this part, a claim shall be deemed to have been presented when the U.S. Postal Service received from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95, Claim for Damage or Injury, or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. Standard Form 95 may be obtained from postmaster, postal inspectors, or other local Postal Service establishments.

§ 912.6 Administrative claim; who may file

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent, or legal representative.

* * *

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

Supreme Court, U.S.
FILED
MAR 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

D.H. HOLMES COMPANY, LTD.,
Appellant

v.

SHIRLEY MCNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Appellee

On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

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REPLY BRIEF OF APPELLANT

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QUESTION PRESENTED

Appellant, D.H. Holmes Company, Limited, disagrees with the statements of the question presented as stated by Appellee and the two amici curiae submitting briefs on behalf of appellee. Holmes submits that the question before the Court, properly stated, is as submitted in its jurisdictional statement, as further clarified in its original brief.

(ii)

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On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASF

Holmes submits that the "Statement of the Case" in its original brief, pages 5-12, accurately sets forth the relevant facts as proven by the trial evidence and testimony.

While reserving its rights generally, Holmes specifically objects to one comment made in the "Statement of Case" submitted on behalf of appellee, Shirley McNamara, Secretary of Revenue and Taxation, the Depart-

ment of Revenue and Taxation, State of Louisiana (hereinafter "appellee," "Louisiana," or "State").

At page 5, appellee states, "They [the catalogs] could have been printed in Louisiana; however, Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere."

There is no evidence in the record supporting the State's contention that Holmes had the catalogs printed out of state to *evade* the Louisiana sales tax. The *uncontradicted* evidence, summarized at page 6 of Holmes' original brief, is: (1) Holmes contracted with New York catalog design professionals through a trade organization of which it was a member, because it received reduced design and printing costs by so contracting, (2) the catalog design professional, not Holmes, chose the out-of-state printers, and (3) under this arrangement, the printers mailed the catalogs from their respective locations in Oklahoma City, Boston and Atlanta. There is no evidence that Holmes had any intent to *evade* any taxes, or that Holmes, contracting under the trade organization package, could have chosen a Louisiana printer, as suggested by the State.

REBUTTAL ARGUMENT

The arguments of appellee and amici curiae on behalf of appellee are best addressed under three subheadings, parallelling the argument in Holmes' original brief: (A) What is the nature of the Louisiana taxing scheme at issue? (B) Given the nature of the taxing scheme, does the *Complete Auto*[1] test apply in adjudging the Commerce Clause constitutionality of the taxing scheme as applied? (C) If the *Complete Auto* test applies, is the Louisiana taxing scheme, as applied in this case, constitutional?

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[1] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

A. What Is the Nature of the Louisiana Taxing Scheme?

Rather than address head-on the nature of its use tax scheme, *i.e.*, where, when and what it seeks to tax, and the importance of the nature of the tax scheme in evaluating its Commerce Clause constitutionality, the State *ignores* the question. Instead, it argues that the use tax was constitutionally assessed, because the Louisiana use tax scheme is "compensating" and is assessed against Holmes at the catalog recipient's mailbox at a time when Holmes, under State law, still *owned* the catalogs. The State argues that Holmes' "ownership" is supported by the fact that Holmes has a right to retrieve the catalogs after they are mailed. It submits that this Court should respect the state court's determination that the incidence of the tax was on the distribution of the catalogs (at the recipients' mailboxes), and that ownership was in Holmes at the time the tax was assessed. *See* Appellee's brief, 12-24.

Assuming that "ownership" is a relevant factor in determining against whom a tax may be assessed, it is irrelevant in determining the initial factor, *i.e.*, whether the item or transaction can be taxed at all.[2] Under this

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[2] The State also argues that Holmes, by changing its "Question Presented" as between its Jurisdictional Statement and its brief, waived its challenge to the constitutionality of La. Rev. Stat. 47:305(E), and further waived any right to disclaim "ownership" over the catalogs at the time the state assessed its tax. *See* Appellee's brief, 20-22. This argument is frivolous. While Holmes changed the language of its "Question Presented" in order to focus the issues, Holmes has waived no arguments thereby. The thrust of the Question Presented, both as stated in the Jurisdictional Statement and Appellant's Brief, is that the Louisiana use tax scheme, as applied to tax the catalogs in this case, is unconstitutional under the Commerce Clause. The change in language was designed to focus the main thrust of Holmes' argument upon the two principal provisions of the taxing scheme, La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A), that provide for the assessment of the tax, and on the fact that these assessing provisions uncon-

Court's jurisprudence, the *nature* of the tax, *i.e.*, what is being taxed, and when and where it is being taxed, provides the key to determining whether any tax may be levied: *Goods* may not be taxed while they are in the course of interstate commerce. *See* cases cited in Holmes' original brief, 16-17. Neither the State nor amici curiae have cited any case decided by this Court upholding the constitutionality of a tax on goods still in the course of commerce, regardless by whom they were owned.

The nature of the Louisiana use tax scheme, as applied in this case, is one which imposes a tax on goods while they are still in the course of interstate commerce. Mr. Bradley, the Director of the Louisiana Department of Revenue Sales and Use Tax Section, indicated that the tax is assessed *on the catalogs* at the time they reach the recipients' mailbox or mailslot (J.A. 60-64). The Louisiana Court of Appeal, likewise, classified the tax as one *on property*, assessed at the time the catalogs reach the recipients' mailboxes:

> La. R.S. 47:302(A)(2) requires the levy of a tax *upon each article of tangible personal property* which is not sold, but brought into Louisiana. . . .
>
> * * *
>
> The use tax is levied *on all tangible personal property* imported from other states for use, consumption, distribution or storage in Louisiana just as if the articles have been sold at retail. . . .

---

stitutionally assess a tax on goods while they are still in the course of interstate commerce.

Under this Court's Rules, particularly Rule 15.1 as referenced by Rule 34, the "Question Presented" is "deemed to comprise every subsidiary question fairly included therein." Clearly, other subsidiary provisions of the taxing scheme, such as La. Rev. Stat. § 47:305(E), as they relate to the imposition of the tax in this case, and the question of "ownership," insofar as it has any relevance at all, are within the scope of the question as presented in Appellant's Brief, and have not been waived.

McNamara v. D.H. Holmes Co., Ltd., 505 So.2d 102, 105 (emphasis added) (J.S.App. 7A). Likewise, the State argues before this Court that the tax is one on the catalogs themselves. *See, e.g.*, Appellee's brief, 12 ("Louisiana imposes a use tax on tangible personal property which a dealer, such as Holmes, imports or causes to be imported into Louisiana . . . ."), and is assessed when the catalogs reach the recipients' mailboxes. *See* Appellee's brief, 12-24. Indeed, the State's entire argument is based on the fact that Holmes *owned* the catalogs in Louisiana at the time the catalogs were taxed. *Id.* There clearly is no merit to the suggestion, raised by amici curiae, the National Governors' Association, *et al.*,[3] that the taxing scheme does not impose a tax on goods.[4]

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[3] Two amici curiae briefs were submitted on behalf of appellee, one collectively on behalf of the National Governors' Association, National Association of Counties, Counsel of State Governments, International City Management Association, National Conference of State Legislatures, National League of Cities, and U.S. Conference of Mayors (hereinafter collectively "the Governors' Association, *et al.*"), and another on behalf of the Multistate Tax Commission. Only the brief submitted by the National Governors' Association, *et al.*, addressed Holmes' challenge to the Commerce Clause constitutionality of the Louisiana taxing scheme. The brief submitted by the Multistate Tax Commission addressed only the due process arguments submitted by some amici curiae submitting briefs in support of appellant. Appellant Holmes in this reply brief, while reserving all arguments previously made by it and on its behalf, limits its rebuttal argument to the Commerce Clause issues presented in its Jurisdictional Statement and original brief.

[4] Even under Louisiana's own interpretation of its use tax scheme, many of the catalogs sent to Louisiana recipients may not be constitutionally taxed. Under the interpretation given the taxing scheme by Louisiana and the Louisiana Court of Appeal, imposition of the tax on Holmes depends on Holmes' "ownership" of the catalogs at the time they are placed in the recipients' mailboxes. What happens when the catalogs are not placed in a mailbox, but are picked up by the recipient directly from the mail carrier or from the Post Office? The answer, under the State's theory, is that these catalogs cannot be taxed, because the state-defined incident of taxation has been eliminated. The result is a confusing rule

Finally, the catalogs clearly were in interstate commerce at the time the state assessed its tax at the recipients' mailboxes. Neither the State nor any amici curiae arguing on behalf of the State in any way question the fact that the catalogs are in the course of interstate commerce while they are in the recipient's mailbox.

The use tax in question is a direct tax on *goods* imposed at a time while the goods still form part of interstate commerce. Holmes submits that the Louisiana use tax statutes, as applied in this case, violate the Commerce Clause, in accordance with this Court's long established rule prohibiting such direct taxation.

B. Given the Nature of the Louisiana Taxing Scheme, Does *Complete Auto* Apply?

The State and amici curiae, the National Governors' Association, *et al.*, submit that *Complete Auto* provides the proper test for determining the constitutionality of the Louisiana use tax scheme. While the State ignores this Court's well established jurisprudence prohibiting the taxation of goods while still part of interstate commerce, amici curiae dismiss this jurisprudence as "antique," and repudiated by *Complete Auto*. *See* brief of National Governors' Association, *et. al.*, 7-8. Amici curiae further suggest that *Complete Auto* applies, because the Louisiana tax impacts an "activity" and not "goods," but would nevertheless apply even if the Louisiana tax impacted "goods." *Id.* 8-10.

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where the constitutionality of the tax on each catalog depends on whether or not delivery occurred through a mailbox.

However, the Court need not address this problem, because goods do not exit the course of interstate commerce when they are placed in a mailbox. Goods form part of interstate commerce and may not be constitutionally taxed until the recipient receives them, whether by removing them from a mailbox, or taking them directly from the mail carrier. *See* Holmes' original brief, 13-15.

This Court's long-standing Commerce Clause rule against taxation of goods forming part of interstate commerce, while possibly "antique," certainly is not obsolete. As recently as *Kosydar v. National Cash Register, Co.*, 417 U.S. 62, 66-67 (1974), this Court noted the continued validity of the rule, set forth in *Coe v. Town of Errol*, 116 U.S. 517 (1886), that *goods* are immune from state and local taxation while in the course of commerce. Again in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976), a foreign commerce clause case, this Court noted the protection from state and local taxation afforded to goods while in the course of commerce. *See* Holmes' original brief, 16. The reason for such protection, to insure the free flow of goods between states, is as valid today as it was at the time the Commerce Clause was drafted. *See* Holmes' original brief, 16-17, *quoting from Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, —, 91 L.Ed.2d 1, 9 (1986).

Consistent with this Court's jurisprudence, a long line of "modern" state appellate decisions have recognized the continued protection of goods from state and local taxation while the goods are in interstate commerce. *See* Holmes' original brief, 18-20.

Most importantly, neither the State nor amici curiae filing briefs in support of the State point to even one case where this Court has repudiated the long-standing Commerce Clause protection from taxation afforded to goods while they are still in the course of interstate commerce. Furthermore, neither the State nor amici curiae in support of the State cite to any cases decided by this Court applying the *Complete Auto* factors in adjudging the Commerce Clause constitutionality of a state or local tax directly on goods in the course of interstate commerce.

This Court's long-standing Commerce Clause rule prohibiting taxation of goods has not been repudiated. Louis-

iana violated this fundamental Commerce Clause prohibition in taxing Holmes on the catalogs while they still formed part of interstate commerce as part of the United States Mail. This Court need go no farther to hold the Louisiana tax, as applied in this case, in violation of the Commerce Clause.

C. If the *Complete Auto* Test Applies, Is the Louisiana Taxing Scheme, as Applied in This Case, Constitutional?

Louisiana and supporting amici curiae contend that the Commerce Clause constitutionality of Louisiana's use tax scheme should be adjudged under the *Complete Auto* test and that the Louisiana taxing scheme satisfies that test. The State argues that the first part of the *Complete Auto* test, requiring the *activity* sought to be taxed be sufficiently connected with the State to justify the tax, is satisfied by the number of stores, customers, and employees Holmes has in Louisiana. *See* Appellee's brief, 28-30. Amici curiae submit that this "nexus" requirement is satisfied, because Holmes directed the distribution of the catalogs to Louisiana residents through the United States Mail, and because Holmes used the catalogs in Louisiana to promote its business. *See* brief of National Governors' Association, *et al.*, 10-11. Finally, both Louisiana and amici curiae argue that the Louisiana Court of Appeal ruling should be sustained because, should Holmes prevail, interstate commerce will be advantaged at the expense of local business. *See* Appellee's brief, 25-27, 34-36; brief of National Governors' Association, *et al.*, 14-16.

Even assuming that the Louisiana use tax scheme imposes a tax on an *activity* and not on the *goods* themselves such that the *Complete Auto* test applies, the Louisiana taxing scheme violates the Commerce Clause.

First, the State's "nexus" argument, like the findings of the Louisiana Court of Appeal and the trial court,

improperly focuses on the relationship between the *taxpayer* and the taxing state, rather than on the relationship between the *activity* and the taxing state, as required by *Complete Auto* and its progeny. Louisiana points to *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), and argues:

> Regarding the collection of use taxes the important relationship is not that between the state and the specific activity for which respondent is collecting taxes, but rather the relationship or nexus between the state and the taxpayer's overall activities within the taxing state which allows imposition of the duty to collect taxes.

Appellee's brief, 28. However, this is not a case like *National Geographic* involving a merchant's duty to *collect* and turn over to the state *taxes owed by others.* Here, Louisiana is attempting to assess *a direct tax* on property it claims Holmes: (1) purchased outside Louisiana, (2) imported into Louisiana, and (3) owned when the tax was assessed at the recipients' mailboxes. The *National Geographic* Court clearly stated that the tax *collection* fact situation presented in that case differed from a *direct tax* fact situation as presented here: Where at issue is the Commerce Clause constitutionality of a direct tax, the nexus required is between the *activity* sought to be taxed and the taxing state. *National Geographic*, 430 U.S. at 560 (quoted in Holmes' original brief, 22-23).

Likewise, the State's reliance on *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. ——, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), is inapposite. Unlike the present case, *Tyler* involved the question whether an out-of-state manufacturer who sold its products in Washington through an independent contractor had a sufficient "nexus" with the state to be subject to Washington's Business and Occupation Tax on wholesale sales. *Tyler* did not involve a challenge to the *activity*-state relationship involved in this case. *Tyler* makes no

pretext, as the State appears to suggest, of transforming the first part of the *Complete Auto* test from one measuring the connection between the taxed *activity* and the state to one measuring the connection between the *taxpayer* and the state.

While the impact of the Louisiana use tax scheme clearly is on *goods*, the State and amici curiae nevertheless argue that the tax should be sustained, because Holmes caused the catalogs to be imported into and distributed in Louisiana, and because the catalogs are related to Holmes' Louisiana business. *See* Appellee's brief, 29-30; brief of National Governors' Association, *et al.*, 10-12.

However, if the Louisiana tax is on the *activity* of distributing and importing (contrary to the State's own characterization and the finding of the Louisiana Court of Appeal—*see* pages 4-5, above), the Louisiana tax violates the Commerce Clause, because there is no evidence in the record that Holmes engaged in this *activity* in Louisiana providing a basis for the tax under *Complete Auto*: the catalogs were designed, printed, addressed and mailed from outside Louisiana. No one testified to any Louisiana *activity* performed by Holmes in "importing" the catalogs, or in "distributing" them to Louisiana recipients.

Nor did Holmes' *use* the catalogs in any use tax sense of the term. After the catalogs were addressed and mailed from outside Louisiana, Holmes lacked the possession or control over the catalogs necessary to make use of them. While the catalogs promoted Holmes' retail business, their *use* was by Holmes' customers to make purchases of goods. Importantly, Louisiana and its supporting amici curiae fail to note that Holmes collects and remits to the State the Louisiana sales tax on each item purchased via the recipients' Louisiana *use* of the catalogs in question. Thus, even if the Louisiana tax impacted an *activity* rather than *goods*, Holmes engaged in

no *Louisiana activity* with regard to the catalogs: the "distribution" activity occurred outside Louisiana.

If the Louisiana tax scheme truly impacts the *activity* of importing and distributing, the taxing scheme plainly violates the Commerce Clause by impacting on an *activity* occurring outside Louisiana. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *Evco v. Jones*, 409 U.S. 91, 93 (1972), and Holmes' original brief, 27.

Also, the suggestions of the State and its supporting amici curiae that Holmes is evading Louisiana taxes and that a ruling for Holmes places it in an advantageous position are without merit. As noted in Holmes' original brief, page 8, Holmes, in connection with its business operations in Louisiana, pays substantial Louisiana taxes, including sales, use, franchise, rental, and income taxes. Likewise, the suggestion that a ruling favorable to Holmes will discriminate against other in-state retailers and printers is meritless. Like Holmes, all retailers may decide where and how they may most economically print and distribute their advertisement materials; Holmes is afforded no option that is not also available to any other Louisiana retailer. Nor are Louisiana printers disadvantaged. Louisiana, like Oklahoma, Georgia, and Massachusetts, exempts from taxation the printing done in-state which is destined for first use out-of-state. *See* La. Rev. Stat. § 47:305(E).[5]

Finally, the fact that interstate commerce *may* be advantaged provides no basis for sustaining a tax where its clear impact is to burden unduly the free flow of commerce between the states. This Court has not hesitated to strike down taxes unduly burdening interstate commerce, even where the particular "interstate commerce"

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[5] La. Rev. Stat. § 47:305(E) provides in pertinent part:

> It is not the intention of this Chapter to levy a tax upon articles of tangible personal property . . . produced or manufactured in this state, for export.

in the case before it received an incidental benefit over a similar intrastate transaction. *See, e.g., Evco v. Jones*, 409 U.S. 91 (1972) (disallowing gross receipts tax on property sold in another state); *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (striking down a holding requiring an out-of-state mail order retailer to collect Illinois "use" taxes from its Illinois customers). Indeed, any ruling in favor of a taxpayer necessarily will result in some advantage to the challenging taxpayer. The question is whether the tax scheme impermissibly burdens interstate commerce.

This Louisiana "mailbox" use tax unduly burdens interstate commerce. The Louisiana burden alone is substantial: the Louisiana use tax scheme, as interpreted by the State and the Louisiana Court of Appeal, subjects to the use tax at the recipients' mailboxes all catalogs, advertisement flyers, and indeed, all commercial correspondence, sent from outside Louisiana. In addition to the State's levy of sales and use taxes, Louisiana has sixty-four (64) "parishes" (*i.e.*, counties), each with the authority to levy its own sales/use tax, and in addition, has other jurisdictions, such as municipalities and school districts, with the authority to impose similar taxes. *See* La. Const. 1974, Art. 6, § 29(A).[6] "Economic Balkanization" is assured when one considers that forty-five (45)

[6] La. Const. 1974, Art. 6, § 29(A) provides:

> Section 29. *(A) Sales Tax Authorized.* Except as otherwise authorized in a home rule charter as provided for in Section 4 of this Article, the governing authority of any local governmental subdivision or school board may levy and collect a tax upon the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property and on sales of services as defined by law, if approved by a majority of the electors voting thereon in an election held for that purpose. The rate thereof, when combined with the rate of all other sales and use taxes, exclusive of state sales and use taxes, levied and collected within any local governmental subdivision, shall not exceed three percent.

states, the District of Columbia, and innumerable local taxing jurisdictions have "use" taxes that can be similarly interpreted. *See* Holmes' original brief, 16-17, 31. Computers and modern technology do not eliminate the burden. Computers only keep track and analyze the data that humans input into their memory. With or without the use of computer technology, merchants will have the *human* burden of keeping track of innumerable, constantly changing tax statutes as applied (or not applied) to innumerable transactions.

The Louisiana use tax scheme, as applied in this case, plainly unduly burdens interstate commerce, whether or not *Complete Auto* provides the criteria for evaluating it.

CONCLUSION

Holmes submits that the Louisiana "mailbox" use tax statutory scheme, as interpreted to impose a "use tax" on the catalogs mailed in interstate commerce to Louisiana recipients, impermissibly burdens interstate commerce in violation of the Commerce Clause. This Court should strike down the Louisiana use tax scheme, as applied, and reverse the judgment and opinion of the Louisiana Court of Appeal, Fourth Circuit; the Court should hold the tax statutes and tax assessment thereunder, unconstitutional under the Commerce Clause.

Respectfully submitted,

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No. 87-267

FILED
OCT 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

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SHIRLEY MCNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Appellee.

On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether a state's imposition of a use tax on a retailer on its merchandise catalogs distributed via the United States mail from outside the taxing State directly to residents within the taxing State contravenes the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-267

D.H. HOLMES CO., LTD.,
Appellant,

v.

SHIRLEY MCNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Appellee.

On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Appellant in the above-captioned case. Written consents of the Appellant and the Appellee have been obtained and are attached herewith.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 42 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 262 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which present issues significantly affecting state and local taxation of interstate commerce.

This case involves an important constitutional question: Whether levy of Louisiana use tax on a Louisiana merchant's cost of purchasing catalogs outside Louisiana and having them mailed from out-of-state locations directly to mailboxes of selected Louisiana residents, without charge, constitutes an impermissible burden on interstate commerce. The Louisiana Court of Appeal, Fourth Circuit, held that imposition of use tax does not infringe the Commerce Clause.

Merchants and other businesses have long utilized the interstate postal system to disseminate catalogs and other printed advertising and informational materials. Prior to the Louisiana Court of Appeal decision in *D.H. Holmes Co., Ltd. v. McNamara*, 505 So. 2d 102 (1987), state courts consistently accorded such interstate mailings immunity from use tax under the long-established rule prohibiting taxation of tangible personal property while in the stream of interstate commerce. For example, in *District of Columbia v. W. Bell & Co., Inc.*, 420 A.2d 1208 (D.C. App. 1980), a case involving facts virtually

identical to those here but affirmed on statutory grounds, the appellate court nevertheless reiterated the constitutional principles articulated below:

> "[S]ince the catalogs were placed in the stream of interstate commerce outside of the District and came to rest only when they reached the individuals to whom they were addressed, the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3, prohibits the state from taxing such goods to Bell." 420 A. 2d at 1210.

The court cited *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), in observing that it is well established that property may not be taxed while moving in interstate commerce. *Id.*

Affirmation of the Louisiana court's ruling will have adverse consequences for all types of business. In addition to catalogs and other printed advertising disseminated by merchants, virtually every kind of business, large and small, utilizes the U.S. Mail to send printed advertising or informational materials without charge to selected consumers. A substantial portion of such mailings are in interstate commerce. Thus, the Louisiana court's unprecedented holding that a use tax can be validly levied on the cost of catalogs by virtue of their "distribution" through the interstate postal system to Louisiana addressees will detrimentally affect the free flow of catalogs and other printed materials mailed in interstate commerce. The novel principle adopted by the Louisiana court—i.e., property mailed from outside the State=in-state distribution=taxable use—could be applied by any State with an appropriately-worded statute to any kind of interstate mailing of advertising or informational material by a firm having a presence in the State. For example, under the ruling, use tax could be applied to the cost of interstate mailings of annual re-

ports to shareholders of companies having an in-state presence.

Companies affected by the *Holmes* ruling will not only be liable for additional taxes but also the inevitable spread of this concept to other States will prove at least as administratively burdensome as the "welter of complicated obligations to local jurisdictions" that this Court in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753, 760 (1967), feared would impede the free conduct of interstate business if mail order firms were required to collect tax on interstate mail order sales to customers in States where the firm is not physically present. The Court noted:

> "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." 386 U.S. at 760.

The "complicated obligations" and "local entanglements" alluded to by the Court concerned the burden associated with requiring non-nexus mail order firms to collect taxes from customers at varying state and local rates on interstate sales. In contrast with the *duty to collect tax* on interstate sales of merchandise involved in *National Bellas Hess*, Holmes is confronted with the *imposition of a direct tax liability* measured by the cost of the catalogs.[1] Thus, Holmes and others having direct tax liability under this holding will be required to deal not only with variations in state and local tax rates but also with detailed record-keeping of printing costs, quantities mailed and their destination, in order to comply with the

[1] It should be noted that this is *not* a *National Bellas Hess* situation wherein the issue was whether a mail order firm (1) sending potential customers its catalogs, (2) receiving orders from customers, and (3) shipping goods to customers in interstate commerce, is required to collect use tax on those goods. In this case, the question is whether the mailing of the catalog itself (whether or not an order is placed) requires a use tax to be paid on the cost of the catalogs to the State where the customer resides.

variations in the tax bases upon which States levy their use taxes. For example, a company's "cost" of printed materials subject to use tax may be limited in one State to tangible property costs, such as paper and ink, while another State may also require inclusion of intangible items, such as production costs and a third state may require mailing costs to be included as well.

In every instance prior to *Holmes*, where an aggressive state taxing authority sought to apply its use tax to the cost of materials mailed from out-of-state locations to residents of the State, state courts have consistently ruled in favor of the taxpayer challenging the state's authority to impose such tax.

For example, the Tennessee Supreme Court, applying Tennessee's use tax statute which is virtually identical to Louisiana, ruled that the Commerce Clause prohibited the imposition of use tax on a Tennessee merchant with regard to catalogs and other advertising material shipped via common carrier and the U.S. Mail from an out-of-state printer to residents of Tennessee. *Service Merchandise Co. v. Tidwell*, 529 S.W. 2d 215 (Tenn. 1975). Similarly, in *District of Columbia v. W. Bell & Co., Inc.*, 420 A. 2d at 1210, the court noted the repugnance to the Commerce Clause of the District's assessment of use tax on catalogs which came to rest when they reached preselected addresses in the District, following an uninterrupted journey in interstate commerce. Also, the Wisconsin Circuit Court for Dane County granted taxpayers' motion for summary judgment and held that catalogs mailed to Wisconsin addressees from outside the State cannot be subjected to Wisconsin use tax because: 1) there was no taxable use of the catalogs in Wisconsin by the taxpayers; and 2) there was a lack of substantial nexus between the State and the mailed catalogs, which nexus was not satisfied by the presence in Wisconsin of taxpayers' stores. *J. C. Penney Company, Inc. v. Wis-*

consin Department of Revenue, No. 84-CV-3978 (Wis. Cir. Ct. 1985) (unpublished).*

The principle in this area has long been clear. Use tax assessments on interstate mailings of catalogs and other promotional material are improper because the merchant has no taxable use of the property received by residents of the State. *See, Modern Merchandising, Inc. v. South Dakota Department of Revenue*, 397 N.W. 2d 470 (S.D. 1986); *Wisconsin Department of Revenue v. J. C. Penney Company, Inc.* 323 N.W. 2d 168 (Wis. App. 1982); *Sears, Roebuck & Co. v. Washington Department of Revenue* 643 P.2d 884 (Wash. 1982) (State did not appeal trial court holding in favor of Sears that catalogs shipped directly by out-of-state printers to Washington addressees were not "used" by Sears within the meaning of the Washington statute); *Sears, Roebuck & Co. v. Ohio Tax Commissioner*, 436 N.E. 2d 1020 (Ohio 1982); *Hoffman-La Roche, Inc. v. Porterfield*, 243 N.E. 2d 72 (Ohio 1968); *Bennett Brothers, Inc. v. New York State Tax Commission*, 405 N.Y.S.2d 803, 62 A.D.2d 614 (N.Y. 1978); *Mart Realty, Inc. v. Norberg*, 303 A. 2d 361 (R.I. 1973); *J. C. Penney Company, Inc. v. Illinois Department of Revenue*, No. 75 L 16730 (Ill. Cir. Ct. 1977) (unpublished).*

Thus, the *Holmes* decision is contrary to the holdings of every other state court on this issue. In upholding the use tax assessment against Holmes' Commerce Clause challenge, the Louisiana Court of Appeal disregarded longstanding precedent and misapplied the constitutional standards established by this Court. The decision should be reversed.

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* This opinion has been lodged with the Court.

SUMMARY OF ARGUMENT

A State may not, consistent with the Commerce Clause, assess its use tax against a merchant on its cost of catalogs printed out-of-state and mailed in interstate commerce directly to residents of the taxing State, free of charge.

ARGUMENT

THE LOUISIANA TAX VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS IMPOSED ON AN ACTIVITY WITH WHICH THE STATE LACKS "SUBSTANTIAL NEXUS."

In upholding imposition of tax against Holmes' Commerce Clause challenge, the Louisiana Court of Appeal analyzed the application of the tax in light of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and *Washington Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), and found that the application of the tax did not violate the Commerce Clause. Under the four-part test established in *Complete Auto Transit*, a tax statute does not violate the Commerce Clause if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does discriminate against interstate commerce; and (4) is fairly related to services provided by the State.[2]

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[2] *Complete Auto Transit* and *Association of Washington Stevedoring Companies* decided only that taxes on the "privilege of engaging in interstate commerce" were valid if they satisfied the four-part test. In both cases, the income sought to be taxed was generated by activities performed entirely within the State. A subsequent decision of the Court, *Commonwealth Edison Company v. Montana*, 453 U.S. 609 (1981), applied the four-part test and upheld imposition of Montana severance tax similarly measured by activities performed entirely within the State, namely, in-state mining activity prior to entry of the coal in interstate commerce.

This Court has yet to decide how, or whether, the four-part test applies to a Commerce Clause challenge to a use tax or other tax imposed on property moving in interstate commerce. On the Louisiana use tax levy against Holmes, the result is the same under either analysis. The tax is contrary to the court's long-established jurisprudence forbidding state taxation of goods in interstate commerce. Similarly, the tax cannot be sustained under the *Complete Auto Transit* analysis because Louisiana does not have "substantial nexus" with the activity it seeks to tax, the distribution of catalogs in interstate commerce.

The Louisiana Court of Appeal applied the four-part test to imposition of use tax on Holmes' catalogs and concluded that the tax satisfied each part. In finding that the tax satisfied the first, or "substantial nexus", test, the court said:

> "The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the total number of catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street store." 505 So. 2d at 105.

The Louisiana Court of Appeal erred in finding that the imposition of tax upon Holmes satisfied the "threshold" or "substantial nexus" requirement. Such finding is wrong because it is premised on the misconception that the "substantial nexus" test was satisfied by virtue of the presence in Louisiana of Holmes' stores.

The "substantial nexus" requirement means that the State imposing the tax must have a significant connection with the specific activity being taxed. *Complete Auto Transit v. Brady*, 430 U.S. at 279. It is *not* enough that Louisiana have nexus with Holmes; it must have nexus with Holmes' activity of distributing catalogs. Holmes

acknowledges that it is present in Louisiana and has nexus there for many purposes (and accordingly pays Louisiana property, income, franchise, sales and use taxes, including Louisiana taxes applicable to merchandise sales generated by the catalogs). However, Louisiana does not have a substantial nexus with the "activity" involved in this appeal, namely, the distribution of the catalogs, and, therefore, under the cases construing the Commerce Clause, Louisiana cannot tax that activity.

The activity upon which Louisiana imposed tax was the "distribution" by Holmes of catalogs to Louisiana addressees. The pertinent provision is La. Rev. Stat. § 47:302(A)(2), which provides, in relevant part, as follows:

* * * *

> "A. There is hereby levied a tax upon . . . the distribution . . . of each item or article of tangible personal property, . . . the levy of said tax to be as follows:
>
> (2) At the rate of [a given percentage] of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state. . . ."

The Louisiana Court of Appeal found that Holmes "used" the catalogs within the meaning of the statute and stated that:

> "Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to tax." 505 So. 2d at 105.

The Louisiana court also found that:

> "After the catalogs were in Louisiana mailboxes they were not part of interstate commerce and became part of the property mass in the state." *Id.*

That finding satisfied the statutory intent that the Louisiana use tax law may not be applied to property

while in interstate commerce as expressed in La. Rev. Stat. § 47:305(E), which declares, in relevant part:

> "(E) It is not the intention of this Chapter . . . to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on . . . the distribution . . . of tangible personal property after it has become a part of the mass of property in this state."

The uncontroverted facts do not support the Louisiana court's findings that the distribution of the catalogs constituted a "use" by Holmes. All acts and activities relating to the distribution of the catalogs occurred outside Louisiana or while the catalogs were in the stream of interstate commerce. Therefore, Louisiana lacked "substantial nexus" with the activity—i.e., distribution—on which the tax was imposed.

The catalogs were designed in New York and printed in Oklahoma City, Boston or Atlanta. The finished catalogs were delivered by the printer to local offices of the United States Postal Service, postage prepaid, for direct mailing to pre-selected residents of Louisiana. Other than the small portion of catalogs mailed to its New Orleans store for distribution to customers, which Holmes conceded are taxable because they are used by Holmes in Louisiana, at no time did Holmes, its employees, or its agents receive or take possession of the catalogs mailed from out-of-state post offices. Once the catalogs were placed in the mail by the out-of-state printer, they entered the stream of interstate commerce and remained there until their ultimate delivery to Louisiana addressees.

Upon delivery, the Louiisana recipients had unrestricted ownership and possession of the catalogs and were free to use or discard them at their pleasure. Thus, if there were a taxable use of the catalogs—presumably, many of them are discarded and not used at all—such use would be by the recipients of the catalogs, not by Holmes.

Accordingly, the Louisiana court's finding that the catalogs ceased to be in interstate commerce after they were delivered to Louisiana mailboxes is irrelevant to its finding that "distribution" constitutes a "use" by Holmes.

In effect, Louisiana predicated its tax upon "use" by Holmes while the catalogs were in uninterrupted interstate commerce, before they came to rest and attained a tax situs in Louisiana. This is inconsistent with the manner in which a use tax has traditionally been applied to property brought into a State; that is, taxation has been restricted to use after the property leaves the stream of interstate commerce and comes to rest within the State. This Court's observation in *Henneford v. Silas Mason*, 300 U.S. 577 (1937), the first decision of the Court upholding a general use tax over objections that it violated the Commerce Clause, is instructive on this point:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." 300 U.S. at 582.

The Court has consistently held that, once interstate movement has begun, property in transit remains immune from state taxation until the property comes to rest within the state, *see, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *J. Bacon & Sons v. Martin*, 305 U.S. 380 (1939); *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U.S. 182 (1939); or, unless a break in the transit occurs in the taxing State that is not incidental to or necessary to further the interstate movement, *see, e.g., Minnesota v. Blasius*, 290 U.S. 1 (1933).

These holdings are relevant to the analysis to determine whether a challenged tax satisfies the "substantial nexus" requirement of the four-part test established in *Complete Auto Transit*. Because property lacks a tax situs while in the stream of interstate commerce, a use tax can be validly applied only to an act or activity with

respect to the property occurring after the interstate commerce is completed (or before it begins). *Minnesota v. Blasius*, 290 U.S. 1 (1933). In the instant case, because the activity Louisiana is seeking to tax—i.e., Holmes' distribution of the catalogs—occurred entirely outside the State and while the catalogs were in interstate commerce, the requisite "substantial nexus" with the activity is lacking. The Louisiana Court of Appeal, therefore, erred in finding there was "substantial nexus."

Compare the Louisiana court's Commerce Clause analysis with the Arkansas Supreme Court's analysis in *Martin v. Riverside Furniture Corp.*, 730 S.W. 2d 483 (Ark. 1987). In that case, the taxpayer raised a Commerce Clause objection to imposing use tax upon printed advertising materials shipped from an out-of-state printer to the taxpayer's Arkansas office where the taxpayer collated, packaged and remailed the materials to sales representatives located outside Arkansas. The taxpayer asserted that taxation of these materials was precluded by a provision in the Arkansas use tax law virtually identical to the Louisiana statute in the instant case. The Arkansas court described the Commerce Clause considerations reflected in the provision as follows:

> "The last sentence of the statute recognizes the constitutional limitation of a state's imposition of a tax on goods in interstate transit. If the goods have not "come to rest" within the state, they are still in the stream of interstate commerce, and a tax may not be levied. . . ." 730 S.W. 2d at 485.

In rejecting the taxpayer's objection to the tax as an impermissible burden upon interstate commerce, the court concluded that because the advertising materials came to rest within the State, albeit for a short period for the purpose of packaging, addressing and mailing, they were not a part of interstate commerce and, therefore, use tax may properly be imposed.[3] The Iowa Supreme Court

[3] The Arkansas court made the following observation regarding *Complete Auto Transit*: "We take this opportunity to recognize that *Brady* does not address that question of whether an item's transit through interstate commerce is continuous or sufficiently interrupted so as to come to rest" 730 S.W. 2d at 485-6.

reached the same result on virtually identical facts in *Inter-State Nurseries, Inc. v. Iowa Department of Revenue*, 164 N.W. 2d 858 (Iowa 1969). *See also Deere & Co. v. Allphin*, 364 N.E. 2d 117 (Ill. App. 1977), where use tax was upheld based on the processing of advertising materials by taxpayer's agent in Illinois prior to their delivery to the post office for interstate mailing

The facts in *Holmes* differ from these cases in the significant respect that after the catalogs came to rest in Louisiana upon being deposited in the mailboxes of Louisiana recipients, the catalogs were the property of the recipients and any use of the catalogs was by the recipients, not by Holmes. Thus, the Louisiana tax was imposed on "use" by Holmes while the catalogs were in interstate commerce and, necessarily, at a point when Louisiana did not have "substantial nexus" with the catalogs or their distribution by Holmes.

In finding "substantial nexus" based on the presence of Holmes' stores in Louisiana, the Louisiana Court of Appeal evidently confused the "substantial nexus" which must be present in order to sustain imposition of a direct tax against a Commerce Clause challenge with the nexus required to impose a duty to collect tax from a customer on an interstate sale of merchandise. This Court's decision in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977) discusses the nexus required to impose a duty on the seller to collect tax on an interstate sale. In upholding California's right to require National Geographic to collect tax on its mail order sales to California residents, this Court said advertising offices maintained in California, even though unrelated to its mail order activity, constitute sufficient nexus to impose a tax collection duty upon National Geo-

graphic.[4] Citing *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the Court stated that:

> "the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the state, but simply whether the facts demonstrate "some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax." 430 U.S. at 561.

While the court in *National Geographic* held that any nexus between the State and the person is sufficient to require an out-of-state seller to collect tax. *Complete Auto Transit* imposes a much more stringent nexus requirement to support imposition of a direct tax against a taxpayer. The requisite nexus, expressed by the Court in *Complete Auto Transit* in unambiguous terms, and recently reiterated in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S.Ct 2810 (1987), is that a tax can be sustained against a Commerce Clause challenge when the tax is applied to an activity having substantial nexus with the taxing state.

The record is clear that there was no in-state use of the catalogs by Holmes to support imposition of tax. All activities relating to the preparation and distribution of the catalogs, *e.g.*, design, printing, labeling, sorting, mailing, etc., occurred outside the territorial boundaries of Louisiana. From the time the catalogs were placed in the mail outside the State of Louisiana, they remained in

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[4] It should be noted that the Louisiana assessment herein involved a direct tax against Holmes on its cost of catalogs sent, free of charge, to Louisiana residents. In contrast, the issue in *National Geographic* was not whether National Geographic was liable for use tax on the cost of catalogs mailed to California residents, but whether California could require National Geographic to *collect* use tax on catalog merchandise ordered by California residents.

uninterrupted interstate commerce until they were delivered to Louisiana addressees. Thus, Louisiana lacked the requisite connection with the distribution of the catalogs, the activity upon which the tax was imposed, and, therefore, the Louisiana Court of Appeal erred in finding that "substantial nexus" was present to sustain the tax against Holmes' Commerce Clause challenge.

CONCLUSION

For the foregoing reasons, the imposition of use tax upon Holmes impermissibly burdens interstate commerce and, therefore, the Court should reverse the decision below.

Respectfully submitted,

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December 24, 1987

Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

IN THE

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OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant,

VS.

SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT ON APPEAL FROM THE COURT OF APPEALS FOURTH CIRCUIT STATE OF LOUISIANA

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

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December 21, 1987

QUESTION PRESENTED

Has the State of Louisiana met the burden to justify overturning the long standing principle of non-taxation of items in interstate commerce pursuant to Article 1, Section 8, Clause 3 of the United States Constitution when advertisements such as catalogs are mailed from an out of state printer directly to potential customers of the taxpayer within the state, without charge.

PARTIES TO THE PROCEEDING

The appellant is D.H. Holmes Co., Ltd., and the appellee is Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana.

Rule 28.1 Listing

Amicus, the National Association of Catalog Showroom Merchandisers states that it is a national trade association of discount retailers, known as catalog showrooms that has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant,

vs.

SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT ON APPEAL FROM THE COURT OF APPEALS FOURTH CIRCUIT STATE OF LOUISIANA

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

INTEREST OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Association of Catalog Showroom Merchandisers ("NACSM"), incorporated under the laws of the State of New York in 1972, is a trade association representing a segment of discount retailing encompassing approximately 2,000 retail stores which do approximately $8 to $10 billion in annual sales. All NACSM members use an annual national or regional catalog as a primary advertising medium.

STATEMENT OF THE CASE

This is a case of a New York printer mailing catalogs to potential customers of a New Orleans retailer in that state; it is a method of doing business similar to that of NACSM members.

This case presents a substantial question never before directly addressed by this Court which will have a serious impact upon NACSM members. Catalog showrooms use the mails to send free catalogs into the different states and, upon information and belief, many state taxing authorities await the decision of this Court to ascertain the limits of their authority to tax catalogs, flyers, and other advertisements that are in interstate commerce.

In a number of cases at the state level NACSM members have successfully defended against claims of a use tax on catalogs still in interstate commerce.

Amicus curiae supports appellant in urging that the protection of goods, or catalogs, in interstate commerce from taxation by a state is the essence of the commerce clause of our constitution.

SUMMARY OF ARGUMENT

It has become widely recognized that the United States and all free economies depend upon the efficient allocation of resources both in the development, manufacture and production of products, as well as in the distribution of those products.

Every isolated attempt to restrain or burden one segment of a community runs the risk of upsetting how this process works. Taxation authorities, denied the experience, accountability and fact finding processes of the legislature and judicial branch, are least equipped to balance the economic and political consequences, as well as the statutory and constitutional mandates in making the determination of when a use tax should be imposed upon an advertising medium. Nevertheless, the Louisiana courts have countenanced such a process.

ARGUMENT

I. THIS "USE TAX" CASE IS AN INAPPROPRIATE ONE TO EXTEND PERMISSIBLE LIMITS FOR A STATE SALES TAX.

This attempt by the State of Louisiana to impose a tax on items still in the free flow of interstate commerce is a particularly inappropriate one. *See McLeod v. Dilworth Co.*, 322 U.S. 327 (1943); see also *Miller Bros. v. Maryland*, 347 U.S. 34 (1954) which held that the mailing of a catalog could not possibly impose a use tax. This brief argues that the state courts consistently erred in finding that the taxing authorities could collect a use tax under Louisiana R.S. 47:305(5).

The instant proceeding is the result of an administrative agency decision to charge a company a tax on catalogs mailed from out of state to members of the consuming public within the State of Louisiana.

All of these state citizens will not become customers of D.H. Holmes Co., Ltd., a retail chain of department stores ("appellant"). Even those members of the public who elect to purchase from appellant may or may not do so as a result of the catalog, and any and all such subsequent sales are subject to a state sales tax. Thus, to the extent that there is any taxable exchange with the State of Louisiana, the state seeks to impose two taxes.

In a somewhat analagous case, a Florida court was asked to uphold a use tax on the stand in which pens were sold, as well as a sales tax on the pens themselves. The Court declined to do so. *Scripto, Inc. v. Carson* 105 So. 2d 775 (Fla. 1958), 362 U.S. 207; see also *Sears Roebuck & Co. v. Massachusetts State Tax Commission*, 345 N.E. 893 (Massachusetts 1976). See also *Burger King v. N.Y.S. Tax Commission*, 70 A.D. 2d 447 (1980) for the proposition that the taxing agency cannot impose a use tax on plastic cups when it also charges a sales tax on the ultimate sale of the beverage.

Furthermore, it seems contradictory to the long term best interests of the state to discourage the use of interstate advertising, and it creates serious constitutional problems when clear limits are not set. For if Louisiana can tax catalogs still within the control of the United States Postal Service, why can't the state taxing agency impose a tax upon advertising on television air waves transmitted from Atlanta, perhaps allocating the tax by utilizing the percentage the viewing public in the state bears to the total audience. If so, is a tax payable by a Radio Havana or any other communication that stimulates the senses of Louisianians? This cannot be considered a rhetorical question in the current economic environment when many taxing authorities are displaying a thirst for additional revenues from any source.

The argument is comparable to taxing one type of publication, but not another, which raises separate issues of unlawful discrimination between classes of merchants, by application of the law, if not by statute. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

II. THE LOUISIANA DEPARTMENT OF REVENUE & TAXATION DOES NOT HAVE THE POWER TO TAX THESE CATALOGS.

Because of financial pressures on state government executives, the case before this Court is a timely and important one which will be widely considered when the appropriate means to raise state revenues are considered. The need to reverse is compelling since it is not the state legislature which has sought to expand and test the constitutional limits of the state's right to tax. As this Court has long noted " . . . If our legislators become too arbitrary in their exercises of their powers, the people always have a remedy in their hands. . . . . " See *Chicago, Milwaukee & St. Paul RR v. Minnesota*, 134 U.S. 418 (1889).

The taxing agency is subject to no such public accountability and it is to the courts appellant must look to remedy an abuse of power. It is most certainly an issue on substance over form, with the operating circumstances governing. *See American Oil Co. v. Neill*, 360 U.S. 451 (1959).

However, the absurdity of removing all limits on a state's taxing power is not the only reason to reverse the decision of the State of Louisiana Fourth Circuit Court of Appeals. There is long standing and strong legal precedent to overturn the decision of the Court below.

III. THE STATE OF LOUISIANA HAS NOT MET ITS BURDEN TO JUSTIFY OVERTURNING THE LONG STANDING CONSTITUTIONAL PRINCIPLE OF NON-TAXATION OF ITEMS IN INTERSTATE COMMERCE PURSUANT TO ARTICLE 1, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

The State of Louisiana did not even offer any sufficient reason at the lower judicial levels to justify reversing clear and conflicting precedent.

The long established rule is that items moving in interstate commerce may not be taxed before they come to rest. *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1977); see *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

This is not a case of insufficient retailer contact with the state to justify imposition of a sales tax as in *National Bella & Hess v. Dept. of Revenue* 386 U.S. 753, (1968) but rather one of insufficient contact of the "goods", that is advertisements, still in interstate commerce.

The very issue of imposing a use tax on catalogs sent by a regional or national retail chain by mail to potential customers within the state asserting the right to tax has been considered by a number of states. We are aware of no case, before the decision of the Louisiana Court in the case at bar, that upheld the tax.

The first of these state court cases involving a NACSM member was decided by the highest court of Tennessee. In that case *Service Merchandise Co., Inc. v. Tidwell*, 529 S.W. 2d 215 (Tenn. 1975) the Tennessee Supreme Court found that catalogs shipped by common carrier from a printer in the north central states to a local post office for mailing to consumers in the state did not come to sufficient rest and control of plaintiff to be deemed a taxable event.

In the *District of Columbia v. W. Bell & Co., Inc.* 420 A.D. 2d 1208 (D.C. App. 1980) the Court once again upheld the nontaxability of catalogs shipped from a Georgia printer to consumers in the district.

In both the *Service Merchandise* and *W. Bell & Co.* cases the catalog showroom company had stores within the taxing jurisdiction. The *W. Bell & Co., Inc.* case supra is also instructive in that the Court determined that the word "use" does not encompass such circumstances as mailing them from out of state to residents within the state, rejecting the concept of any "promotional" effect. The court said it found the *Bennett Brothers* decision, discussed *infra*, to be persuasive.

In *Bennett Brothers, Inc. v. N.Y.S. Tax Commission*, 405 N.Y.S. 2d 803 (N.Y. Ct. of Appeals 1978), New York's highest court of appeals not only found that there was no authority to charge a use tax on catalogs mailed from out of state to consumers within the state, but taxed the state "costs" to express its displeasure of the taxing agency to even attempt to charge the merchant. In this case as in the *Service Merchandise* and *W. Bell* cases, the retailer had stores in the state that the taxing authority sought to impose the use tax. The Court once again focused upon a lack of any real control over the property within the state when it is still in the flow of interstate commerce.

The Court noted that the state imposed a use tax based upon the erroneous conclusion by the taxing authority that the merchant exercised a right of control over the destination of the catalogs. The Court held that the prior case of *Matter of Ford Motor Company* concluded that distribution of advertising material to Ford distributors in the state did not constitute a taxable event, and that there was no distinction at law between the cases. The Court further noted that the claim that no tax was due was bolstered by the fact that it is not an exemption that is claimed, but rather the contention that the catalogs in issue are not even covered by the taxation statute, citing *Grace v. N.Y.S. Tax Commission*, 37 N.Y. 2d 193 (1975).

The mere power of the owner to divert the shipment already started does not take it out of interstate commerce. *Hughes Bros. Timber Co. v. Minnesota*, 1272 U.S. 469 (1926); see also *Farmers Union Corp. v. Kansas State Corp. Comm.*, 302 F. Supp 778 (D.C. Kan. 1969).

The appellant released control of the catalogs when it released them to the U.S. mails. As innumerable courts have noted the "gift," if that is to be the nomenclature, took place outside of Louisiana. The appellant did not control the use and enjoyment within the state. The present case cannot be compared with *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) in that *Complete Auto* rests upon a tax for doing business within the state, a condition appellant fully complies with, having retail stores within the state and paying sales tax on all transactions within the state.

It is a well established principle of statutory construction that taxing statutes should be more strongly construed against the taxing authority *Gould v. Gould*, 245 U.S. 151 (1917); 51 *Am Jur*, Taxation, Section 308, 82; *C.J.S.*, Statutes Section 390; 2 Cooley *Taxation*, 4th Ed. Sec 503. Thus any ambiguity in the scope of the statute must be construed against the imposition of any tax. Furthermore, no tax can be imposed under the United States Constitution.

Courts have recognized that it is inappropriate to extend a sales/use tax to such advertising as newspaper supplements in cases such as *Sears Roebuck & Co. v. Mass. State Tax Commission, supra*, spurning such "fine spun" distinctions as the state taxing authority would have this court accept. See for example *Mart Realty, Inc. v. Norberg*, 111 R.I. 402 (1973) wherein the court held that the mailing of advertising circulars into the state relegated any potential "use" to that of the potential customer.

CONCLUSION

Implicit in this reasoning is the recognition that it is the consumer who receives the catalog. The consumer did not make any payment to warrant a sales tax, and ordinarily does not consent to its receipt to warrant a use tax. The taxing agency then refusing to acknowledge that there has not been a taxable event, ignores the interstate commerce issue and in this case even ignores that there has not been any legislative mandate to so burden commerce. The tax administrator merely decides to take the money and let the courts decide the issue. NACSM respectfully suggests that this decision is clearer than most. A use tax should not and cannot be imposed upon catalogs in such circumstances without violating the United States Constitution, Article 1, Section 8, Clause 3.

The National Association of Catalog Showroom Merchandisers respectfully requests that the Court reverse Court of Appeals of the Fourth Circuit of the State of Louisiana, in the public interest.

Respectfully submitted,

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December 21, 1987

Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL,
CLERK

No. 87-267

IN THE

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OCTOBER TERM, 1987

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Appellant,

v.

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit,
State of Louisiana**

BRIEF OF R. R. DONNELLEY & SONS COMPANY, MAGAZINE PUBLISHERS OF AMERICA, INC., AND PRINTING INDUSTRIES OF AMERICA AS *AMICI CURIAE*

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December 24, 1987

QUESTION PRESENTED

Whether the Commerce Clause permits a State to impose a use tax directly upon a company's purchase outside of the state of services, such as the design and printing of catalogs, when those catalogs are mailed to residents of the State.

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IN THE

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D. H. HOLMES CO., LTD.,
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SHIRLEY MCNAMARA,
Secretary of Revenue and Taxation,
The Department of Revenue and Taxation,
State of Louisiana,
Appellee.

**On Appeal from the Court of Appeal,
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BRIEF OF R. R. DONNELLEY & SONS COMPANY, MAGAZINE PUBLISHERS OF AMERICA, INC., AND PRINTING INDUSTRIES OF AMERICA AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Amicus R. R. Donnelley & Sons Company ("Donnelley") is a Delaware corporation, with its principal place of business in Chicago, Illinois. Donnelley is the largest printer of merchandise catalogs in the United States, serving both de-

partment stores and mail order customers. It owns and operates printing plants in 15 states and prints merchandise catalogs for major national department stores and direct mail retailers.[1]

At issue in this case is the State of Louisiana's power to tax directly the out-of-state design and printing of catalogs produced in New York, Oklahoma and other states once those catalogs are mailed to Louisiana residents. Donnelley frequently provides the type of services which the State seeks to tax. Accordingly, Donnelley wishes to explain why the Commerce Clause prohibits Louisiana from taxing the out-of-state transactions at issue here.[2]

Amicus Magazine Publishers of America, Inc. ("MPA") is a national organization that represents the interests of more than 200 companies engaged in the publication of approximately 800 consumer-interest magazines. Members of MPA distribute the magazines that they publish via the United States mail to subscribers throughout the United States and the world. Accordingly, the MPA has an interest in presenting its views because of the potential impact on its operations of the Court's holding in this case concerning the states' authority, under the Commerce Clause, to impose a tax on the interstate distribution of magazines.

Amicus Printing Industries of America ("PIA") is the largest national trade association of the printing and graphic arts industry. PIA represents approximately 10,000 companies in the United States and its members are responsible for approximately 85 percent of the gross sales of the industry. Because of the potential impact of the Court's decision in this case on interstate sales of printing services and on interstate distribution of printed material, the PIA seeks to present its views concerning the authority of the states, under the Commerce Clause, to impose a tax on the transactions at issue in this case.

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1 In 1986, Donnelley printed and mailed 4.3 billion pieces of mail of which 2.9 billion pieces were catalogs, flyers and similar merchandise advertisements. In 1986, Donnelley accounted for 5.3 percent of all third class mail delivered by the United States Postal Service.

2 Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of those letters have been filed with the Clerk of the Court.

STATEMENT

Amici adopt appellant's statement of the case and emphasize the following facts:

1. Appellant D.H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation with its principal place of business in New Orleans, Louisiana. Appellant operates department stores within Louisiana as well as several other states. From 1979 to 1981, appellant contracted with New York companies to design and prepare merchandise catalogs, which were printed outside of Louisiana in Boston, Massachusetts, Oklahoma City, Oklahoma and Atlanta, Georgia. Once the catalogs were prepared, the printing companies delivered them, postage prepaid, to the offices of the United States Postal Service in the state in which they were printed and mailed them directly to appellant's customers.[3] The catalogs, which were provided at no charge to the recipient, contained instructions to the postal carrier to leave them with the current resident if the addressee had moved. J.S. App. 4a.

Although appellant purchased the catalogs for the use of its customers and the promotion of its business,[4] it is undisputed that neither appellant nor any of its agents ever had any possession or control of the vast majority of the catalogs delivered within Louisiana.[5] Indeed, as a practical matter, the possession and use of the catalogs was wholly beyond appellant's control once the printers placed them in the United State mail outside of Louisiana.

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3 Eighty-two percent (82%) of the catalogs were delivered to residents of Louisiana.

4 The catalogs were not provided to encourage mail order sales because Holmes did not then, and does not now, conduct a mail order business.

5 There were some minor exceptions to this distribution pattern. The court below found that a small number (approximately 1000) of the catalogs were distributed by appellant from its Canal Street store in New Orleans (J.S. App. 7a) and Holmes paid the tax on these catalogs without protest. Appellee states that some of the catalogs were returned by the United States Postal Service to Holmes at the store that was listed as the return address for the catalog delivery. Motion to Dismiss, 2.

2. The Louisiana statutes at issue impose a tax upon:

> "the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of each item or article of tangible personal property. . . ."

La. Rev. Stat. 47:302(A); La. Rev. Stat. 47:321(A). In this case the state has imposed a use tax based on the "cost" of the catalogs distributed in Louisiana in 1979-1981—a two percent tax on "the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state." La. Rev. Stat. 47:302(A)(2). The statute defines "use" to include "the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business." La. Rev. Stat. 47:301(18).

Louisiana has a complementary sales tax on goods of two percent on "the sales price of each item or article of tangible personal property when sold at retail in this state." La. Rev. Stat. 47:302(A)(1). That tax is not applicable here because Holmes purchased the catalogs outside of Louisiana. However, if the catalogs at issue here had been printed in Louisiana, they would have been taxed, not as a sale of goods, but at the two percent rate on "sales of services. . . in this State." La. Rev. Stat. 47:302(C). The statute defines "sales of services" to include "the furnishing of printing or overprinting, lithographic, multilith, blue printing, photostating or other similar services of reproducing written or graphic matter. . . ." La. Rev. Stat. 47:301(14)(d).

In Louisiana a sales or use tax may be collected from any "dealer," a term that is broadly defined to include any person who has "used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property" (La. Rev. Stat. 47:301(4)(c)), or who "sells or furnishes any of the services subject to tax under this Chapter (La. Rev. Stat. 47:301(4)(f)), or who "purchases or receives any of the services subject to tax under this Chapter." La.

Rev. Stat. 47:301(4)(g). Thus, Louisiana's statute is sufficiently broad to allow the State to tax (1) the recipients of the catalogs; (2) the purchaser, Holmes, or (3) the out-of-state companies that printed the catalogs. Finally, the Louisiana statute provides that:

> "It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bonafide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible property after it has come to rest in this state and has become a part of the mass of property in this state."

La. Rev. Stat. 47:305(E).

The Louisiana Department of Revenue and Taxation assessed a use tax against Holmes based upon the cost of all catalogs mailed directly to Louisiana residents. Holmes protested the State's assessment of the tax.

3. The State filed this suit in the Louisiana Civil District Court for the Parish of Orleans, seeking to recover the amount of the use tax which Holmes refused to pay. Holmes, in its answer to the lawsuit, expressly raised the defense that the imposition directly upon Holmes of the use tax as a purely interstate transaction violated the Commerce Clause.

The trial court found that the distribution of the catalogs within Louisiana "w[as] intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana" and that appellant could be taxed on this "use" of the catalogs. J.S. App. 22a. Moreover, the court found that "[o]nce the catalogs reach the residences of the prospective customers to whom they are addressed, Louisiana taxing authority reaches the resting place of the catalogs . . . ." J.S. App. 22a. Therefore, the trial court spe-

cifically rejected Holmes' contention that such an application of the statute violated the Commerce Clause.

The Louisiana Court of Appeal, Fourth Circuit, affirmed. It found that "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *Id.* With respect to the state's power to tax, the Court of Appeal stated that the "taxable moment occurs 'when the property has been withdrawn from interstate commerce and has become part of the mass of property of the taxing state.' " J.S. App. 7a. In the circumstance of this case, the court held that "[a]fter the catalogs were in Louisiana mailboxes, they were not part of interstate commerce and became part of the property mass in this state." *Id.*

Because Holmes is located in the State of Louisiana, the court concluded that the Commerce Clause requirement, that the activity taxed have a "substantial nexus" with the state, was satisfied. J.S. App. 8a-9a. The court also stated that the tax "does not create dissimilar treatment" between in-state and out-of-state taxpayers and, therefore, the tax does not discriminate. J.S. App. 9a. Finally, the court noted that no other state taxes the printing services used by Holmes and therefore the tax is fairly apportioned. Accordingly, the court concluded that, under the four-part test established in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), imposition of the tax on Holmes for the interstate distribution of its catalogs does not violate the Commerce Clause. J.S. App. 9a.

A petition for a writ of certiorari to the Supreme Court of Louisiana was denied. J.S. App. 11a. This Court noted probable jurisdiction on November 2, 1987. 56 U.S.L.W. 3312 (Nov. 3, 1987).

SUMMARY OF ARGUMENT

1. A state tax on interstate commerce may be upheld only if it (1) is "applied to activity with a substantial nexus with the State", (2) is "fairly related to the services provided by the State"; (3) does "not discriminate against interstate

commerce"; and (4) is "fairly apportioned." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). The first two factors of the test—the "jurisdictional" or "nexus" requirements—exist because "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967) (quoting *Freeman* v. *Hewit*, 329 U.S. 249 (1946)).

In the instant case, the State of Louisiana has no nexus to the "activity" at issue: the design and printing of the catalogs out-of-state and their distribution through the United States mail to Louisiana residents. With certain minor exceptions not issue here, Holmes, the in-state "purchaser" of the catalogs, never had possession of the catalogs within the State. Clearly, Louisiana provides no services in connection with the design and printing or the distribution of the catalogs through the United States mail and thus, with respect to these transactions, Louisiana has not "given anything for which it can ask return." See *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

Louisiana's nexus to the taxpayer, Holmes, is insufficient, standing alone, to satisfy the Commerce Clause requirements for taxing this activity. If nexus to the taxpayer were sufficient, the State could impose a tax on all transactions entered into by local business, regardless of where the transaction occurred. However, this Court clearly has held otherwise. See *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965). In addition, the State's argument that out-of-state printers will have an "advantage" unless this tax is upheld also is insufficient, as a matter of law, to uphold the tax against Commerce Clause challenge. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938). In fact, the tax in question does not "equalize" the burden between in-state and out-of-state printers. Instead, the financial and administrative burden on Holmes of a use tax for employing an out-of-state printer is greater than the burden of a sales tax for use of an in-state printer.

Finally, Louisiana should not be permitted to uphold this tax based on its strained and artificial argument that Holmes "owned" the catalogs at the time that they came to rest in its customers' mailboxes within the state. This Court's analysis of a state's power to tax focuses on "economic realities" —not on abstract notions of ownership. The record conclusively demonstrates that Holmes' customers were the only parties to "use" the catalogs within the State of Louisiana, and the State does not choose to tax their "use" of the catalogs.

2. In *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), this Court held that the State of Illinois could not compel a mail order company to collect a use tax on out-of-state purchases of goods by Illinois residents when the State's only connection with the transaction was the delivery of the goods "via the United States mail or common carrier." *Id.* at 754. This Court noted that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Id.* at 759.

The instant case involves indistinguishable out-of-state "transactions" that have no greater nexus to the state than did the transactions at issue in *Bellas Hess.* Moreover, the fact that Holmes is present in Louisiana is not a basis to tax these out-of-state "transactions." *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938). As this Court has noted, if state power to tax such interstate transactions is upheld, interstate business will become "entangle[d] . . . in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of local government.' " *Bellas Hess,* at 759-760 (footnotes omitted). It is clear that the State of Louisiana cannot demonstrate that the transaction or activity at issue is sufficiently connected to the State to justify directly imposing the use tax upon Holmes. See *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977), and cases cited therein. Thus, the use tax imposed by the State fails to satisfy the minimum requirements of the Commerce Clause and must be struck down.

3. Finally, the imposition of the use tax on the catalogs in this case is analogous to the imposition of a state tax on interstate communications. Despite Louisiana's extraordinary efforts to characterize the catalogs as "goods" and to explain how Holmes "uses" the goods that it never possesses or controls the catalogs are at bottom nothing more than a medium by which Holmes communicates with its customers regarding the quality and cost of its merchandise. Accordingly, the tax in this case is nothing more than a state tax on interstate communications, which this Court clearly has prohibited. See, *e.g., Fisher's Blend Station* v. *State Tax Comm'n,* 297 U.S. 650 (1936); *Cooney* v. *Mountain States Tel. Co.,* 294 U.S. 384 (1935).

ARGUMENT

LOUISIANA'S IMPOSITION ON HOLMES OF THE USE TAX ON CATALOGS SENT BY OUT-OF-STATE PRINTERS THROUGH THE UNITED STATES MAIL TO LOUISIANA RESIDENTS VIOLATES THE COMMERCE CLAUSE

The instant case presents a novel application of this Court's well-established requirements for determining when the Commerce Clause permits a state to levy a use tax on goods in interstate commerce. Generally, a use tax is imposed as a percentage of the cost price of goods purchased outside the state but used or consumed within the state. La. Rev. Stat. § 47:302; see *Miller Bros.* v. *Maryland,* 347 U.S. 340, 343 (1954); *Henneford* v. *Silas Mason, Co.,* 300 U.S. 577 (1937); see generally Powell, *Sales and Use Taxes: Collection from Absentee Vendors,* 57 Harv.L.Rev. 1086 (1944). The use tax is imposed on the purchaser of the goods, but, to ensure enforcement of the tax laws, the obligation to collect the tax is imposed on the seller. La. Rev. Stat. §§ 47:303, 47:301(4); see *Miller Bros.,* 347 U.S. at 343; *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753, 757 n.9 (1967).

This Court has held that the obligation to collect a use tax cannot be imposed on an out-of-state seller engaged in exclusively interstate transactions unless there is " 'some definite link, some minimum connection, between a state

and the person, property or transaction it seeks to tax.' " *Bellas Hess*, 386 U.S. at 756 (quoting *Miller Bros.*, 347 U.S. at 344-45). In the present case, the obligation to collect the tax has not been imposed on the out-of-state seller (*i.e.*, the printer) because the State of Louisiana has no connection to the out-of-state printer and could not constitutionally impose on the printer the obligation to collect any tax. Faced with this obstacle, the State instead has imposed the use tax on Holmes, the "purchaser" of the catalogs.[6]

Thus, the issue is whether the Commerce Clause permits the State to require Holmes to pay a use tax on the cost of the catalogs distributed to residents of the State, despite Holmes' purchase of the printing and design of the catalogs outside of Louisiana and Holmes' lack of control over the catalogs after they have left the hands of the printers.[7]

I. THE LOUISIANA USE TAX VIOLATES THE COMMERCE CLAUSE AS APPLIED TO A TRANSACTION IN INTERSTATE COMMERCE WHICH HAS NO NEXUS TO THE TAXING STATE

This Court has enunciated a four-part test for determining whether a state tax can survive challenge under the Commerce Clause. A tax may be upheld only if it (1) is "applied to activity with a substantial nexus with the State";[8] (2) is

6 The Louisiana Court of Appeal stated that the "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the 'use' tax." J.S. App. 7a.

7 Other state courts have reached a conclusion contrary to that of the Louisiana courts. See, *e.g.*, *District of Columbia* v. *W. Bell & Co.*, 420 A.2d 1208 (D.C. 1980); *Hoffmann-LaRoche, Inc.* v. *Porterfield*, 243 N.E.2d 72 (Ohio 1968); *Mart Realty, Inc.* v. *Norberg*, 303 A.2d 361 (R.I. 1973); *Bennett Bros.* v. *State Tax Comm'n*, 405 N.Y.S.2d 803 (1978).

8 This requirement, under the Commerce Clause, of "nexus" to the person and transaction taxed is "closely related" to the test for determining whether a state tax may survive scrutiny under the Due Process Clause. *Bellas Hess*, 386 U.S. at 756. That determination turns on the "simple but controlling question [of] whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940); see *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952).

"fairly related to the services provided by the State"; (3) does "not discriminate against interstate commerce"; and (4) is "fairly apportioned." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). The first two requirements of the test—the "jurisdictional" or "nexus" requirements—exist because "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967) (quoting *Freeman* v. *Hewit*, 329 U.S. 249 (1946). In addition, the "nexus" requirement serves the prophylactic function of ensuring that over-reaching state taxation does not impede the "free flow of trade between the States." See L. Tribe, *American Constitutional Law*, 347 (1978); *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).[9]

The Louisiana use tax, as applied to the activity at issue in this case, fails to meet the first two requirements of the four-part test. In the instant case, there is no nexus between Louisiana and the sale of the catalogs or the services required to create the catalogs, all of which occurred outside of the State. In fact, Louisiana has no connection at all to the transaction at issue—the design and printing of catalogs, purchased out-of-state, and their distribution through the United States mail to residents of Louisiana. With certain minor exceptions, which are not at issue, see, *supra*, note 5, Holmes, the in-state purchaser, never had possession or control of the catalogs within the State. Thus, the application of the State's use tax runs squarely into "the limitation of use taxes to consumption within the State" which is required to avoid taxing interstate commerce directly. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977).

9 The latter two factors (3) and (4) in the test are designed to ensure that those economic interests that lack political representation in the state do not unfairly bear the brunt of state taxation, at the expense of interstate commerce. See *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45-46 n.2 (1940); *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946).

Stated differently, Louisiana provides no services in connection with the distribution of the catalogs in question; they travel by United States mail from the out-of-state printers directly to residents of Louisiana and other states. Thus, Holmes cannot be asked to pay for the "use" of these catalogs which Holmes' Louisiana customers receive because the State has not "given anything" with respect to the creation or distribution of catalogs "for which it can ask return." See *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. at 444.

Louisiana, however, makes three arguments by which it seeks to overcome this lack of nexus to the transaction. First, Louisiana emphasizes its substantial nexus to the *taxpayer* in this case—the purchaser of the goods, Holmes. But, as should be plain from the description above of the Court's Commerce Clause jurisprudence, this Court has required that the state, before taxing an interstate transaction directly, must demonstrate some connection to the transaction or "activity" taxed, not just to the taxpayer. *Washington Stevedoring*, 435 U.S. at 750; *Bellas Hess*, 386 U.S. at 759 ("it is difficult to conceive of commercial *transactions* more exclusively interstate in character than the mail order transactions here involved") (emphasis added).

In circumstances where the state merely seeks to impose the obligation to *collect* the use tax (from in-state purchasers) on the "out-of-state" seller, this Court has held that the states' minimum contacts with the seller are sufficient and that the seller's in-state contacts need not be related to the out-of-state sales or transactions. See, *e.g.*, *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 560 (1977). In the present case, however, Louisiana is seeking to impose the use tax *directly* on the purchaser—Holmes—and not simply to require an out-of-state seller to *collect* the tax. Thus, what is "fatal" to the constitutionality of the tax is the fact that it is a direct tax being imposed on an out-of-state transaction, which is "dissociated from the local business" of Holmes. *National Geographic*, 430 U.S. at 560 (quoting *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965)); *Norton Co.* v. *Illinois Revenue Dep't*, 340 U.S. 534, 537 (1951).

If the rule were otherwise and mere presence of the taxpayer in the state were a sufficient nexus to impose a tax, then states could impose a tax on all transactions entered into by local businesses, regardless of where the transaction took place. But, clearly that is not the law. Compare *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 348 (1944) (Indiana sales tax on sale by local company to out-of-state customer upheld where "[t]he consummation of the transaction was an event within the borders of Indiana.") with *American Oil Co.* v. *Neill*, 380 U.S. 451, 458-59 (1965) (Idaho sales tax on sale by company licensed to do business in Idaho struck down on Commerce Clause grounds where sale negotiated and delivery made outside of Idaho). Louisiana has not taxed Holmes for the catalogs which were sent from the printers to Holmes' customers outside of Louisiana because it is, by statute, limited to taxing property that has "become a part of the mass of property in this state." La. Rev. Stat. 47:305(E). However, absent this statutory limitation, if mere nexus to the taxpayer were a sufficient basis for a state's taxing authority, there is no reason why the catalogs distributed to Holmes' out-of-state customers could not also be taxed. In the present case, the State of Louisiana simply has failed to demonstrate "a sufficient 'nexus between such a tax *and transactions* within a state for which the tax is an exaction.' " See *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 464 (1959) (emphasis added).[10]

Second, the State argues that taxing Holmes on the distribution of the catalogs to Holmes' customers is necessary to avoid giving the out-of-state printers (*i.e.*, the sellers in this case) an advantage over in-state printers, who presumably would be required to collect the tax on their services if such catalogs were manufactured and sold within Louisiana. In effect, Louisiana argues that its statute is necessary to avoid discrimination against in-state printers and to collect

[10] *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80-81 (1938) ("a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.")

from Holmes its "fair share of the cost of local government." Both of these arguments are flawed.

In the first place, any "advantage" gained by interstate commerce in escaping local tax burdens does not justify imposing a tax on such commerce, particularly when it could entangle Holmes "in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.' " See *Bellas Hess*, 386 U.S. at 759-760; *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) ("a tax, otherwise unconstitutional, is not converted into a valid exaction merely because . . . the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within").

Moreover, the State's "unfair advantage" argument ignores the fact that Holmes pays sales tax on every item it sells. If, in fact, Holmes' catalogs generate additional sales at Holmes' stores within the State, then the State will receive the tax generated by the catalogs. Indeed, since Holmes almost certainly includes the cost of the catalogs in the price of the goods it sells, it already is taxed on the cost of the catalogs. It defies economic reality, which is the touchstone of Commerce Clause analysis, to suggest that Holmes will somehow "escape" sales tax if the State is unable to collect the tax on the interstate distribution of its merchandise catalogs.

But, in any event, if Louisiana's right to impose this use tax is affirmed, the tax burden imposed on in-state printing of catalogs will very likely be far less than the tax burden imposed for out-of-state printing of catalogs. Under the Louisiana statutes, a sale of printing services in-state is taxable by the state and by the single parish and municipality in which the sale takes place. La. Rev. Stat. 33:2711, La. Rev. Stat. 33:2721, and La. Rev. Stat. 33:2737. If out-of-state printing is taxable under the use tax, *every* parish (and municipality) where the catalogs are used or consumed will be permitted to collect a local tax from Holmes. There are 228 jurisdictions in Louisiana which now have authority to levy

such a tax. Each of these jurisdictions requires the filing of a separate monthly tax return and imposes a tax rate that varies from the rate imposed by other jurisdictions. The cumulative burden of using an out-of-state printer (and then paying the use tax to the state and to *each* local government) will not equal but will, in fact, far exceed the in-state printer's burden of paying a single state sales tax. Louisiana State Tax Reporter (CCH) ¶ 75-991 (1987).

Additionally, the State's imposition of a use tax on the *cost price* of the catalogs results in the imposition of the tax on a higher "cost" basis than would have been the case if these catalogs had been produced by Louisiana companies. From the record, it appears that Holmes contracted with New York companies to design the catalogs and those companies contracted with printers in Boston, Oklahoma City and Atlanta to print and mail the catalogs. Under the Louisiana statute, if these services had been provided in Louisiana, Holmes would have been taxed on a sale of services which includes "the furnishing of *printing* . . . or other similar *services* of reproducing written or graphic matter" (La. Rev. Stat. 47:301(14)(d)), (emphasis added) but does *not include* the cost of designing or mailing the catalogs. *Dunham Rentals Inc.* v. *West Feliciana Parish School Bd.*, 241 So. 2d 295, 297 (Ct. App., 1st Cir. 1970). Thus, Holmes would pay tax on a larger tax base (*i.e.*, a base which included design and mailing costs) by having the catalogs printed out of state than it would have paid if the catalogs had been printed in Louisiana. A similar infirmity caused this Court to strike down Louisiana's attempt to impose its use tax on out-of-state manufacturers where a similar tax base was applied to in-state manufacturers. *Halliburton Oil Well Co.* v. *Reilly* 373 U.S. 64, 70-71 (1963).

Louisiana's final argument is that, as a matter of state law, Holmes "owned" the catalogs at the moment that they "came to rest in Louisiana by placement into . . . the recipient's mail or post office box." Motion to Dismiss, 3. This argument is nothing more than a strained and artificial conceptualization designed to conceal the truth that Holmes at no time had possession, control, or use of, or contact with,

the catalogs within the State of Louisiana.[11] See, *supra*, *p. 4*. Although the State clearly is free to interpret the meaning of the term "use" under its own statute, this Court's analysis of the State's jurisdiction to tax under the Commerce Clause must be focused on "economic realities"—not abstract principles. See *Complete Auto Transit*, 430 U.S. at 274. Thus, the State could just as easily argue as a constitutional matter that the catalog(s) sent to a resident just across the border in Texas is a "use" in Louisiana because the purpose of the catalog is to bring that Texas resident into Holmes' store in Louisiana. But that definition of "use" cannot obscure the fact that Louisiana lacks the power to tax that transaction. Similarly, whether or not Louisiana deems a resident's use to be attributable to Holmes does not supply any basis for the Court to uphold the State's tax against a Commerce Clause challenge.

The State of Louisiana should not be permitted to achieve through distortions of state law what the Commerce Clause prohibits. Holmes' customers, who received the catalogs through the United States mail, were the only persons within the jurisdiction of the State to own and possess the catalogs in question. Accordingly, the lack of any nexus—direct or indirect—between the state and the transaction taxed renders the tax at issue impermissible under the Commerce Clause.

II. The Louisiana Use Tax At Issue Violates The Commerce Clause Under The Holding In National Bellas Hess

The issue of whether the shipment of goods, by United States mail, into the taxing state creates a sufficient "nexus" with the state to justify imposition of a use tax on those goods was resolved conclusively by this Court in *National*

[11] Adoption of this metaphysical ownership theory effectively would allow Louisiana's interpretation of the state law of ownership to "overrule" *Bellas Hess*. See, *infra*, *pp. 18-19*. It is clear that Bellas Hess—like Holmes—could have been deemed, under Louisiana law, to have "owned" the mail order goods at the time those goods "came to rest" in the mailbox of its customers.

Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). In that case, the obligation to impose and collect the Illinois use tax was imposed on an out-of-state mail order company whose only contact with its Illinois customers was "via the United States mail or common carrier." *Id.* at 754. This Court noted that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Bellas Hess*, 386 U.S. at 759. Because of the lack of nexus between the State of Illinois and the *transactions* (*i.e.*, the out-of-state sales) at issue, this Court held that the Illinois use tax on goods mailed by Bellas Hess to its Illinois customers violated the Commerce Clause. The Court explained why the absence of a state nexus to the transactions posed a threat to the free flow of goods in interstate commerce:

> [I]f the power of Illinois to impose use tax burdens upon [National Bellas Hess] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. . . . The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping entanglements could entangle [National Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

Bellas Hess, 386 U.S. at 759-760 (footnotes omitted). The nexus between the State of Louisiana and the transactions at issue in the present case is no greater than that found insufficient to permit the use tax in *Bellas Hess*. In the present case, the Louisiana purchaser (Holmes) contracted with an out-of-state designer and out-of-state printers to prepare and deliver catalogs to Holmes' customers. As in *Bellas Hess*, the entire transaction took place outside of the taxing state except for the final delivery of the catalogs "via the United States mail . . . ." See *Bellas Hess*, 386 U.S. at 754. Thus, it is clear, that the out-of-state printers (*i.e.*, the sellers of the catalogs) could not be required to collect any use tax. But Louisiana seeks to avoid the Commerce Clause impediment inherent in *Bellas Hess* by requiring that the in-state

purchaser (Holmes)—rather than the out-of-state seller—pay the tax. This it cannot do.

The fact that the purchaser of the catalogs, Holmes, resides within Louisiana does not render the tax on the transaction at issue permissible under the Commerce Clause. Although Louisiana clearly possesses jurisdiction over Holmes, it is not enough for purposes of direct taxation to have the taxpayer within the Court's jurisdiction. The State must also have some tangible relationship with the taxable event or transaction. *Miller Bros.* v. *Maryland*, 347 U.S. 340, 343 (1954); *Conn. Gen. Life Ins. Co.* v. *Johnson*, *supra* at 80-81; see, *supra*, at 11-13. Neither the courts below nor the State of Louisiana has made any effort to demonstrate that the transaction or activity at issue—the out-of-state purchase of the catalogs and shipment, via United States mail, to Holmes' customers—is "sufficiently connected" to Louisiana, in any real sense, to justify the tax. *Complete Auto Transit*, 430 U.S. at 287; *Washington Stevedoring*, 435 U.S. at 750. Accordingly, the use tax imposed by the State fails to satisfy the minimum requirements of the Commerce Clause and must be struck down.

III. THE LOUISIANA USE TAX AT ISSUE VIOLATES THE COMMERCE CLAUSE AS A TAX ON INTERSTATE COMMUNICATIONS

The imposition of a use tax on these merchandise catalogs is closely analogous to various state taxes on interstate communications which have uniformly been struck down by this Court. At bottom the catalogs serve only as communications about, or advertising of, Holmes' merchandise. This Court has disallowed a state occupation tax on local radio stations measured by the gross receipts from radio broadcasting as an unconstitutional burden on interstate commerce. *Fisher's Blend Station* v. *State Tax Commission*, 297 U.S. 650, 655 (1936) ("By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."). Similarly, the Commerce Clause has been held to prohibit state taxation of the revenues derived from interstate messages sent by telegraph (*Telegraph Company* v. *Texas*, 105 U.S. 460 (1881)) and an occupation tax applied to a local telephone company based on the number of telephones it owned because they were used for both intrastate and interstate communications. *Cooney* v. *Mountain States Tel. Co.*, 294 U.S. 384 (1935).

The use tax at issue here is not imposed on goods that have been purchased out of state and brought into Louisiana by Holmes for use or consumption. Despite the State's strained characterization of the tax as being imposed upon Holmes' "use," the Louisiana tax is, in effect, a tax on Holmes' interstate communications with its customers. This the Commerce Clause does not allow. Holmes' merchandise advertisements could not have been taxed by Louisiana had they been broadcast by radio or television or transmitted to customers by telegraph. No practical justification exists for allowing the communications to be taxed simply because Holmes chooses to deliver its advertisements via the United States mail in the form of merchandise catalogs.

CONCLUSION

The judgment of the Louisiana Court of Appeal, Fourth Circuit, should be reversed.

Respectfully submitted,

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December 24, 1987

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

D. H. HOLMES CO., LTD.,

Appellant,

v.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE & TAXATION,
THE DEPARTMENT OF REVENUE & TAXATION,
STATE OF LOUISIANA,

Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit, State of Louisiana**

BRIEF OF THE AMERICAN RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-267

D. H. HOLMES CO., LTD.,

Appellant,

v.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE & TAXATION,
THE DEPARTMENT OF REVENUE & TAXATION,
STATE OF LOUISIANA,

Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit, State of Louisiana**

INTEREST OF *AMICUS CURIAE*

American Retail Federation was founded in 1935 to provide retailers with a unified and central voice for rapid and effective response to government regulations and policies affecting the industry and its customers. Headquartered in Washington, D.C., the Federation serves as an umbrella organization encompassing a variety of large and small retailers, state retail associations, and national retail associations. The Federation's uniqueness is in the nature of this membership, which includes fifty state retail associations, twenty-four national retail associations, and corporate retailers ranging from the largest general merchandise department stores and discount store chains to small specialty stores. The retail industry accounts for nearly one-quarter of the

gross national product and employs over sixteen million persons.

The Federation is critically concerned with the Court of Appeal of Louisiana's decision in this case, which the Federation submits is in error. The State of Louisiana's view of the reach of its taxing jurisdiction distorts this Court's Due Process and Commerce Clause jurisprudence in the context of taxation and causes a severe disruption in both the flow of mail in interstate commerce and the ability of retailers and others (both profit and non-profit entities) to use direct mailings to communicate promotional or other information to the citizens of this country. Because this Court's decision will have a direct effect on matters of prime importance to the Federation and its members, the Federation submits this brief to assist the Court in its resolution of the case.[1]

[1] Pursuant to Sup. Ct. R. 36, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

This case concerns the power of a state to levy a use tax against a taxpayer's activities which are not fairly related to the taxing state. In this case, the State of Louisiana is in effect levying tax on D.H. Holmes Company, Ltd. ("Holmes") for the distribution by the U.S. Postal Service to state residents of direct mail informational catalogs printed out-of-state. In levying this use tax against Holmes, the State of Louisiana has exceeded its jurisdictional taxing power, as limited by both the Due Process Clause, U.S. Const. amend. XIV, § 1, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The state has improperly linked an in-state use of property to the wrong taxpayer.

Holmes is a retailer with stores in Louisiana, Alabama, and Mississippi. (Joint App. 54-55, 68-69, 78-79, 80-81). To advertise the goods it has for sale in its stores, Holmes purchases catalogs to send to its charge account customers. (Joint App. 54-55, 71-73, 75-76, 89, 38-39). The creative work of designing Holmes' catalogs is done in New York City by advertising agencies. (Joint App. 70-71, 83-85). On Holmes' behalf, the agencies purchase paper for the catalogs, contract for their printing, and arrange for mailing to Holmes' customers. All catalogs are printed in either Atlanta, Boston, or Oklahoma City and mailed from those points. (Joint App. 57-58, 74, 80, 81, 83-87, 88, 90, 91). The printers deliver the completed catalogs to the post office and Holmes pays the postage by sending checks to the post offices in these cities. (Joint App. 81-82).

During the period 1979 through 1981, Holmes purchased nineteen merchandise catalogs for a total amount of $2,024,000. The Secretary of Revenue and Taxation of Louisiana audited Holmes and assessed it "delinquent Louisiana general sales tax," *inter alia*, on the invoices rendered to Holmes for its catalog purchases.[2] The Secretary of Revenue

[2] The assessment was levied on the eighty-two percent of merchandise catalogs that were mailed to Holmes' customers in Louisiana. Eighteen per-

and Taxation then instituted an action in the Civil District Court of Orleans Parish to collect the tax. (Joint App. 54-55, 78-79, 80-81). (Petition for Payment of Delinquent Taxes and Ex. A thereto, Joint App. 2-7). Holmes contended from the outset that the tax "violates the interstate commerce clause of the constitution of the United States of America . . . ." (Defendant's Answer to Petition for Payment of Delinquent Taxes, Joint App. 11-13). The trial court sustained the assessment.

The Louisiana Court of Appeal, Fourth Circuit, affirmed. *McNamara* v. *D.H. Holmes Co.*, 505 So.2d 102 (La. App. 1987). The Louisiana Supreme Court refused further review. *McNamara* v. *D.H. Holmes Co.*, 505 So.2d 102 (La. App. 1987), *cert. denied*, 506 So.2d 1224 (1987). Jurisdiction was noted by this Court in *D.H. Holmes Co.* v. *McNamara*, ____ U.S. ____, 108 S. Ct. 283 (1987).

The tax in question was levied in these terms:

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein . . .
>
> (1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; . . .
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; provided there shall be no duplication of the tax.

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cent of the catalogs were sent to Alabama and Mississippi customers and were not taxed. (Joint App. 54-55, 78-79, 80-81).

La. Rev. Stat. Ann. § 47:302(A)(2) (West 1987). An additional one percent tax is imposed by La. Rev. Stat. Ann. § 47:321(A).[3]

The tax "shall be collected from the dealer, as defined herein, [and] shall be paid at the time and in the manner hereinafter provided . . . ." La. Rev. Stat. Ann. § 47:302 (C).[4]

The "dealer" is directed to collect the tax from "the purchaser or consumer."[5] For sales taking place *outside* Louisiana:

> Every dealer located outside the state making sales of tangible personal property for distribution, storage, use, or other consumption, in this state, shall at the time of making sales collect the tax imposed by this Chapter from the purchaser.

La. Rev. Stat. Ann. § 47:304(B).

Dealers are ordered "as far as practicable, [to] add the amount of the tax imposed under this chapter . . . to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts." La. Rev. Stat. Ann. § 47:304(C).

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[3] The additional one percent tax levied by La. Rev. Stat. Ann. § 47:321 (A) also "shall be collected from the dealer, and/or wholesaler as provided for and defined by said Chapter 2 of Title 47; shall be paid at the time and in the manner provided by said Chapter; . . ." La. Rev. Stat. Ann. § 47:321 (C).

[4] The additional one percent tax levied by La. Rev. Stat. Ann. § 47:321(A) also "shall be collected from the dealer, and/or wholesaler as provided for and defined by said Chapter 2 of Title 47; shall be paid at the time and in the manner provided by said Chapter; . . ." La. Rev. Stat. Ann. § 47:321(C).

[5] La. Rev. Stat. Ann. § 47:301(4) defines a "dealer" as "every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state."

Louisiana specifically recognizes the constitutional limitations upon its power to impose tax:

> nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

La. Rev. Stat. Ann. § 47:305(E).

SUMMARY OF ARGUMENT

Louisiana's use tax levy upon Holmes' out-of-state activities violates the Due Process Clause of the Constitution because Louisiana lacks transactional nexus with the activities it seeks to tax. Louisiana lacks the requisite nexus in several respects. First, Louisiana impermissibly attempts to tax transactions and activities occurring wholly beyond its jurisdiction. Second, the taxed activity, the use of the promotional materials within the state, is not sufficiently connected to Holmes, the party against whom the tax is assessed. Finally, Holmes' local retail operations do not create nexus sufficient to tax activities unrelated to this local business. Holmes' activities in arranging the production, printing, and mailing of catalogs to Louisiana residents from out of state is a transaction that is clearly interstate in character. Because these activities are dissociated from Holmes' local business and are interstate in nature, they lack the nexus required to support taxation by Louisiana. *Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534 (1951).

The application of Louisiana's use tax to Holmes' distribution of promotional materials through the mail also constitutes an impermissible burden on interstate commerce in violation of the Commerce Clause. In upholding the tax, the Louisiana court improperly applied the test in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Louisiana lacks a sufficient nexus with Holmes' out-of-state activity, and therefore the first requirement of *Complete Auto's* four-part test is not met. Moreover, Louisiana's tax on the actual movement of mail through the interstate mail system unfairly burdens interstate commerce and the remote mail sender who uses that system. Since the Louisiana use tax, as applied in this case, violates both the Due Process and the Commerce Clause of the United States Constitution, the judgment below should be reversed.

ARGUMENT

I. LOUISIANA'S ATTEMPT TO TAX APPELLANT'S OUT-OF-STATE ACTIVITIES VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Louisiana Cannot Tax Transactions Or Property Wholly Beyond Its Jurisdiction.

Louisiana's levy of a use tax upon Holmes for its activities in connection with promotional materials created, paid for, and shipped from out of state constitutes a denial of Holmes' constitutional right to due process under the law, because the State of Louisiana does not have a sufficient nexus or connection with the taxpayer's activities it seeks to tax. The requirement of sufficient nexus between a tax and the transactions within a state upon which the tax is levied is "the most fundamental precondition on state power to tax." *General Motors Corp.* v. *Washingon*, 377 U.S. 436, 450, *reh'g denied*, 379 U.S. 875 (1964) (J. Brennan, dissenting). The Due Process Clause of the Fourteenth Amendment requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 345 (1953), *reh'g denied*, 347 U.S. 964 (1954); *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960); *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965). The tax must be applied to "an activity with a substantial nexus with the taxing state." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, *reh'g denied*, 430 U.S. 976 (1977). Hence, Louisiana must have a sufficient nexus with the activity of the taxpayer it seeks to tax before a tax may properly be imposed.

The Louisiana use tax statute provides that a use tax can be imposed only on "tangible personal property" that is purchased outside of the State of Louisiana, brought into Louisiana and "used, consumed, distributed, or stored for use or consumption" *in Louisiana*. La. Rev. Stat. Ann. § 47:302

(A)(2). A use tax is distinct from a tax upon the property itself. It is a "tax on the enjoyment of that which was purchased." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). "[A] use tax, like a sales tax, is an excise or privilege tax different in kind from a tax *on* property." *Sullivan* v. *United States*, 395 U.S. 169, 177 n.28 (1969). Since the tax is imposed upon the *use* of the catalogs, rather than upon the catalogs themselves, Louisiana must have a substantial nexus with that activity. Moreover, the use of the catalogs must sufficiently relate to Holmes in order to withstand constitutional scrutiny. *Henneford* v. *Silas Mason*, 300 U.S. 577 (1937).

The United States Supreme Court has recognized that:

> All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from sales tax.
>
> * * *
>
> *But the limitation of use taxes to consumption within the State so as to avoid problems of due process that might arise from the extension of the sales tax to interstate commerce* . . . does not avoid all constitutional difficulties.

National Geographic Society v. *Calif. Bd. of Equalization*, 430 U.S. 551, 555 (1977) (emphasis added, citation omitted).

Implicit within this pronouncement is the principle that a state's attempt to tax beyond its border is invalid as a violation of the Fourteenth Amendment. The rule that a state may tax only that which is within its jurisdiction was first articulated by the United States Supreme Court in 1873 and has never been abrogated:

> The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects

> are persons, property and business. Whatever form taxation may assume, whether as duties, imports, excises or licenses, it must relate to one of these subjects.

Cleveland, Painesville & Ashtabula R.R. Co. v. *Commonwealth of Pennsylvania*, 82 U.S. 179, 186 (15 Wall. 1873).

The rule has been followed without exception. For instance, in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204 (1930), this Court refused to uphold a Minnesota tax assessed upon the testamentary transfer of Minnesota state and municipal bonds issued to a New York resident. The transfer was effected in New York, where the will was probated. In striking down Minnesota's inheritance tax assessment, the Court observed that "no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment." *Id.* at 210.

Similarly, this Court underscored the constitutional limits placed upon a state's power to tax in *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77 (1938):

> But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. *But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.*

Id. at 80-81 (emphasis added).

The tax at issue in *Connecticut General* was a California franchise tax levied upon gross premiums received from insurance business conducted within California. *Id.* at 78. The taxpayer, a Connecticut insurance company licensed to do business in California, entered into reinsurance contracts in Connecticut with other California insurance companies. California sought to tax these contracts because they reinsured policies issued by the California companies to California residents. Since the reinsurance contracts involved no action taken in California, the tax could not be sustained.[6]

These cases therefore mandate that the use or consumption taxed by Louisiana must occur within the state in order to avoid problems of due process. Although use tax schemes in general are constitutional, such taxes must be imposed with regard to an attribute of property ownership *exercised within the state* by the taxpayer sought to be taxed. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). Property acquired or transported in interstate commerce may be subject to a use tax when the article is actually used or is made available for use within the taxing state. *Id.* at 583. Here, there was no use or consumption by Holmes within Louisiana.[7] Holmes' ac-

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[6] *See also Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412 (1936), *reh'g denied*, 302 U.S. 772 (1937) ("The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed."); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 138-139 (1937) (citations omitted) ("As to territorial jurisdiction. — Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia [which sought to impose the tax], the State had no jurisdiction to impose the tax. . . . It is clear that West Virginia had no jurisdiction to lay a tax upon [taxpayer] with respect to [its] work done in Pennsylvania."); *ARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982) ("As a general principle, a State may not tax value earned outside its borders.")

[7] Section 47:301(18) of the Louisiana Revised Statutes Annotated provides:

> "Use" means and includes the exercise of any right or power over

tivities regarding the use and purchase of the catalogs occurred entirely outside the State of Louisiana. The artistic and design work occurred in New York City (Joint App. 70-71, 83-85). At Holmes' direction, New York agencies purchased paper and arranged for the printing and mailing of the catalogs. The catalogs were printed and mailed by the printers from either Atlanta, Boston, or Oklahoma City. (Joint App. 57, 74, 80, 81, 83-87, 88, 90, 91). Holmes sent checks to the post offices in these cities in order to cover postage. (Joint App. 81). It is apparent that every phase of the transaction took place outside Louisiana. The only connnection that linked Louisiana to this activity was the receipt of the catalogs by Louisiana residents. Any use or consumption by Holmes occurred wholly beyond the borders of Louisiana and is therefore beyond the taxing power of that state.

The Louisiana appellate court determined that the taxable use by Holmes consisted of the distribution of the catalogs. "Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *McNamara* v. *D.H. Holmes Co.*, 505 So.2d at 105. Thus, if "use" is construed as causing the catalogs to be distributed, such use or distribution must have occurred within Louisiana in order to be taxable. It is clear that Holmes' actions in arranging for the purchase, production and printing of catalogs in no way was connected to Louisiana.[8] The remaining phases of the distribution process likewise did not occur

tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of property in the regular course of business.

[8] Any preliminary activity which may have taken place in Louisiana is not a taxable event because it occurred *before* the tangible personal property which forms the basis of the tax came into existence. A use tax premised upon use or distribution within the state cannot be levied until (1) tangible personal property exists, (2) is purchased out-of-state, (3) is then brought into the state and (4) is used or distributed within the state by the person against whom the tax is to be levied. *See, e.g., Henneford* v. *Silas Mason*, 300 U.S. 577 (1936).

within Louisiana. The act of arranging for the mailing of the catalogs and designating their recipients did not take place within Louisiana. Thus, the Louisiana appellate court upheld the imposition of a use tax on an activity which was conducted entirely outside the state.[9] The tax upon the "distribution" therefore violates the Due Process Clause of the Fourteenth Amendment.

B. The Activity Which Is The Subject Of The Tax Is Not Sufficiently Connected To The Taxpayer Upon Whom The Tax Is Levied.

The consumer or user of the property in this case is the recipient of the catalog, not Holmes. Holmes used the catalogs only while they were located outside the State. By its own terms, the Louisiana use tax law is not intended to "levy a tax on bona fide interstate commerce." La. Rev. Stat. Ann. § 47:305 (5). Indeed, the Louisiana appellate court noted that the taxable moment occurs "when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state." *McNamara* v. *D.H. Holmes Co.*, 505 So.2d at 105. Withdrawal from interstate commerce and incorporation within the state occurs in this case when the catalogs are placed in the recipient's mailbox. At this moment, Holmes did not possess the power to exercise *any* rights incidental to the catalogs.[10] Thus, the

[9] The State has interpreted its use tax scheme to reach Holmes because any attempt by the State to levy a use tax against the real users in this case, the recipients of the catalogs, would be administratively unworkable. However, Holmes' out-of-state actions in designating the catalog recipients and directing the mailing process did not amount to the type of meaningful use to which the use tax statute is directed.

[10] Once the catalogs are placed in the letter box, any right of Holmes to control the catalogs is extinguished. Federal law prohibits the taking of mail from a letter box, and punishes such taking by fine or imprisonment. 18 U.S.C.A. § 1708.

subject of the tax, use of the catalogs in Louisiana, is not sufficiently connected to Holmes. The fact that Holmes conducts a retail business in Louisiana, and may arguably receive a benefit from the use of catalogs by others in Louisiana,[11] does not eliminate the simple fact that Holmes itself does not use the catalogs in Louisiana within the meaning of the use tax statute.

The Louisiana appellate court recognized that "[t]he thrust of the use tax is that purchasers or users pay taxes on all tangible personal property bought or used within the taxing authority's jurisdiction." *McNamara* v. *D.H. Holmes Co.*, 505 So.2d at 104. However, the court below misapplied this principle to these facts. The law requires "purchasers" to pay taxes on property "bought" within the state, and requires "users" to pay taxes on property "used" within the state. The state court erroneously required Holmes as *purchaser* to pay taxes on property *used* within the state. Louisiana has authority to levy a tax against Holmes as purchaser only on those catalogs purchased within Louisiana. In addition, Louisiana has authority to levy a tax against anyone who used them within Louisiana. Those users were the individual recipients of the catalogs, not Holmes. Clearly then, the activity which is the subject of the tax is not sufficiently connected to Holmes and therefore Louisiana's taxation of that activity violates the Due Process Clause.

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[11] In the Louisiana appellate court, the State asserted that Holmes "used" the catalogs because the Louisiana addressees' use within the State created an indirect benefit to Holmes. The Court of Appeals of Louisiana did not find that any "promotional effect" or indirect benefit to Holmes constituted use by Holmes. *See McNamara* v. *D. H. Holmes Co.*, 505 So.2d 102.

Moreover, the Louisiana statute does not define "use" in terms of indirect benefit. Rather, "use" is defined in terms of the exercise of any right or power of an incident of ownership. *See supra* n.7. No concept of "secondary" or "constructive" use appears in Louisiana's statutory scheme. Holmes lacks any ability to exercise incidents of ownership regarding the catalogs deposited with the United States Postal authorities. Holmes also cannot control whether the property ever reaches its destination.

C. Taxation Of Appellant Is Precluded Because The Appellant's Activities Do Not Have Sufficient Nexus With Louisiana.

The Louisiana appellate court determined that the nexus requirement was satisfied because Holmes operated thirteen stores intrastate. *McNamara* v. *D.H. Holmes Co.*, 505 So.2d at 106. However, a taxpayer's presence within the state does not automatically create nexus sufficient to support taxation of activities which occur outside the state. A taxpayer's in-state activities which are unrelated to the taxed transaction do not create sufficient nexus to properly tax the unrelated activities. *Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534 (1951). The *Norton* rule provides that even if a taxpayer maintains a business within the taxing state, there is no nexus for activities occurring outside the state if the "particular transactions are dissociated from the local business and interstate in nature." 340 U.S. at 537.

Norton involved a Massachusetts manufacturer selling products in Illinois. The taxpayer maintained a branch office in Illinois from which it made local sales at retail. The Illinois office also acted as an intermediary, receiving orders from Illinois residents to be forwarded to Massachusetts, or receiving goods from Massachusetts for shipment to customers within Illinois. The Illinois court held that the presence of the taxpayer's local retail outlet was sufficient to render the taxpayer liable for a direct tax based on the gross receipts of all Illinois sales. *Id.* On appeal, this Court upheld the tax on the direct sales made at retail from the Illinois office, as well as those imposed on transactions where the Illinois office acted as an intermediary. However, the Court excluded all income attributable to orders sent directly to Massachusetts by the customer and shipped directly to the customer in Illinois. The Court refused to uphold the tax on these direct sales because "the State could not reasonably attribute [the] proceeds [of the direct sales] to the local business." *Id.* at 539. Because these transactions were "clearly interstate in character," they were exempted from taxation. *Id.*

Holmes' in-state activities are clearly dissociated from the advertising activities which Louisiana seeks to tax. The act of arranging for the promotion, printing, and mailing of catalogs to Louisiana residents from out of state is a transaction that is "clearly interstate in character." The taxed activity, the "distribution" of the promotional materials, involves the transportation of property from one state to another, as well as transactions and activities between several states.

Subsequent cases have reaffirmed *Norton's* continued viability. In *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965), the *Norton* test was applied to invalidate a state tax on due process grounds. Idaho sought to impose a direct tax on an out-of-state transaction. Although the taxpayer engaged in business in Idaho, the taxed transaction was "entirely unconnected with [the taxpayer's] business in that State." *Id.* at 458. "Each and every phase of the transaction had its locus outside of Idaho. . . ." *Id.* Thus, the tax could not be sustained because there were "no in-state activities connected with out-of-state sales." *Id.*

In *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), *overruled on other grounds, Tyler Pipe Industries, Inc.* v. *Washington*, ____ U.S. ____, 107 S. Ct. 2810 (1987), *Norton's* dissociation test was applied to uphold a tax on the privilege of engaging in business levied upon General Motors' gross wholesale sales of products, including General Motors' sale and shipment of cars and parts from outside the state. The Court found sufficient nexus because the taxed activity was "enmeshed in local connections." *Id.* at 447. This Court observed:

> *Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity*, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors . . . and still maintain that same degree of immunity.

Id. at 448 (emphasis added).

"Dissociation" under the *Norton* standard did not exist in *General Motors* because the taxed transactions "fairly related" to the taxpayer's local business activities. *Id.* at 441. In the instant action, the same direct relationship between the goods shipped into the state and the interstate sales does not exist. There is no way to know what use the recipients make of the catalogs.[12] Many uses may not relate at all to Holmes' in-state sales. Unsolicited advertising distributed free of charge — often termed "junk mail" — frequently goes unopened or is promply discarded without a second thought.

Finally, unlike the activities of General Motors, which consisted of a complex structure of in-state divisions designed to facilitate in-state sales, Holmes' activities were clearly interstate in character. At the heart of the *Norton* rationale is the recognition that purely interstate activities of even an in-state taxpayer should be exempt from taxation. *See Norton Co.* v. *Dep't of Revenue*, 340 U.S at 539. In contrast to General Motors, Holmes did not "channel its operations" through a "maze of local connections." *General Motors Corp.* v. *Washington*, 377 U.S. at 448. The out-of-state activities connected with Holmes' arrangements for the purchase, pro-

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12 The indirect and uncertain nature of any alleged benefit attributable to Holmes serves to distinguish this case from *Standard Pressed Steel Co.* v. *Dep't of Revenue*, 419 U.S. 560 (1975). In *Standard*, a Pennsylvania corporation manufactured and sold products to Boeing, its Washington customer. Standard employed a single employee in Washington whose primary function consisted of the solicitation and procurement of orders from Boeing. Although all orders were placed directly by Boeing to Standard's Pennsylvania location, the employee's in-state activities were singularly targeted to Boeing and directly brought about the sales in question.

Standard may be further distinguished from this case because the nexus analysis in *Standard* pertained to Standard's allegation that Washington lacked sufficient nexus for the imposition of a business and occupation tax. The Court therefore considered whether Standard's obvious business activities within the state were sufficient to permit Washington to exercise jurisdiction over Standard itself (an "entity" nexus inquiry). Instead, this case focuses on a transactional nexus inquiry, that is, Louisiana's nexus with Holmes' *use* of the property.

duction, printing or distribution of the catalogs were separate and independent from its local activity. The distribution of the catalogs was not channeled through Holmes' local presence; such distribution was purely interstate in character. Since Holmes' in-state activities are dissociated from the activites Louisiana seeks to tax, the *Norton* rule precludes taxation in this case.

Because Louisiana lacks sufficient nexus with Holmes' activities conducted outside the state, Louisiana's attempt to tax these activities violates the Due Process Clause. Therefore, the Louisiana Court of Appeal decision should be reversed.

II. THE APPLICATION OF LOUISIANA'S USE TAX TO THE DISTRIBUTION OF INFORMATIONAL CATALOGS THROUGH THE MAIL CONSTITUTES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

The Constitution provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Three of the central purposes of the Commerce Clause are to assure the unrestricted flow of commerce throughout the several states,[13] to insure a national economy free from unjustifiable local entanglement,[14] and to protect commercial intercourse from invidious restraints.[15] Each of these purposes is frustrated by the Louisiana court's decision to uphold the use tax in the case before this Court.

In determining that the tax as levied does not violate the Commerce Clause, the appellate court analyzed the tax under the four-prong test this Court articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).[16] Under *Complete Auto*, "[i]f the state tax 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fair-

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[13] *Indiana Dep't of State Revenue* v. *Frank Purcell Walnut Lumber Co.*, 152 Ind. App. 122, 282 N.E.2d 336 (1972).

[14] *National Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967).

[15] *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Western Union Tel. Co.* v. *Pendleton*, 122 U.S. 347 (1887); *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887); *County of Mobile* v. *Kimball*, 102 U.S. 691 (1881); *Welton* v. *Missouri*, 91 U.S. 275 (1876); *Steamship Co.* v. *Portwardens*, 73 U.S. 31 (6 Wall. 1867).

[16] The question of whether the Louisiana Court of Appeal was correct in applying the *Complete Auto* test to this tax on goods in the stream of commerce has been adequately briefed by the parties, and so will not be rediscussed in this brief.

ly related to the services provided by the State,' no impermissible burden on interstate commerce will be found." *Dep't of Revenue* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 760 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, *reh'g denied*, 430 U.S. 976 (1977); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979).

The Louisiana appellate court erred, however, in ruling that the use tax imposed in this case meets *Complete Auto's* fourfold requirements, for on these facts the first requirement is not met. As is discussed previously in Section I of this brief, in this case the tax is applied to activities of the taxpayer which do *not* have a substantial nexus with Louisiana.

Moreover, the facts and issues presented in *Complete Auto* are clearly distinguishable from the facts and issues presented here. The tax at issue in that case was levied for the privilege of carrying on a business in the State of Mississippi. The taxpayer, Complete Auto Transit, Inc., was clearly doing business within the State of Mississippi.[17] Nevertheless, Complete Auto argued that no tax may be applied to an activity that is part of interstate commerce, *even when the taxed activity occurred entirely within the borders of the taxing state. Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 278. Essentially, the issue in *Complete Auto* was the degree of immunity from state taxation to be provided to interstate commerce, for the taxpayer in that case espoused the concept that "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278.

Thus, the appellant's sole contention in *Complete Auto* rested on the state's inability to tax *in-state* activity related to interstate commerce as a per se rule and the Court's *Complete Auto* decision is entirely consistent with Holmes' position. In fact, the taxpayer in *Complete Auto* did not make any of the claims asserted by Holmes. Twice the *Complete Auto* Court

[17] The taxpayer was engaged in the business of transporting motor vehicles from railcars in Mississippi to Mississippi dealers. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 276.

noted that the appellant "did not allege that its activity . . . does not have a sufficient nexus with the State . . . [and] it does not claim that discrimination or undue burdens exist in fact." *Id.* at 278.

In contrast, Holmes contests Louisiana's power to levy a use tax on its out-of-state activities which lack a sufficient nexus with Louisiana. Holmes also contests Louisiana's ability to unfairly burden interstate commerce by levying its taxes on the actual movement of mail through the interstate mail system, and the use of that system by a remote sender of mail.

Neither *Complete Auto* nor its progeny have addressed these concerns.[18] Therefore, the conclusions reached in those cases are not determinative of the particular issues presented here.

This Court has repeatedly noted that in subjecting tax statutes to Commerce Clause scrutiny it no longer adheres to formalistic labels, but instead looks to "economic realities" in determining the constitutionality of state taxing schemes. *See, e.g., Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 293 n.7, *reh'g denied*, 439 U.S. 885 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279 (1977). In this case, the economic realities of the situation are that it is impossible for Louisiana to tax the real in-state users — the ultimate consumers who receive and use the catalogs in the state within the meaning of the statute. The in-state residents who receive Holmes' promotional catalogs receive the catalogs free of charge. The recipients then "use" the catalogs within the

[18] *See, e.g., Dep't of Revenue* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (business and occupation tax was properly applied to in-state stevedoring activities in loading and unloading ships' cargo, based on *Complete Auto*); *Commonwealth Edison Co.* v. *Montana*, 453 U.S 609, *reh'g denied*, 453 U.S. 927 (1981) (severance tax upheld on coal mined within state and shipped outside state); *Exxon Corp.* v. *Dep't of Revenue*, 447 U.S. 207 (1980) (for purposes of income taxation, the state assessed a tax based on total income of vertically integrated petroleum company, where company performed marketing activities within the taxing state).

meaning of La. Rev. Stat. Ann. § 47:301 (18) and (19) in a variety of ways.[19] Whether the recipients of the catalogs read them or merely throw them away, it is not feasible for the state to attempt to levy a use tax against the recipients. In an attempt, therefore, to reach a deeper pocket, the State levies a use tax against Holmes for the distribution in Louisiana of the catalogs.

Holmes, however, was *not* the distributor of the catalogs, which were put into the mail by the out-of-state printers and delivered in the State of Louisiana to the recipients by the United States Postal Service. Therefore, the State's taxation of Holmes for the distribution in Louisiana is unconstitutional on due process grounds, as discussed in Section I above. Even assuming for the sake of argument, however, that Holmes was involved in the distribution of its catalogs in the State of Louisiana,[20] then the Louisiana use tax in essence taxes Holmes' use of the United States Postal Service.

This constitutes as direct a burden on interstate commerce as is imaginable. What is essentially being taxed is a person's ability to use the United States Postal Service to communicate to others, as well as the actual movement of the property itself in interstate commerce.

Louisiana claims to be levying its tax on distribution of the

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19 La. Rev. Stat. Ann. § 47:301 provides in pertinent part:

> (18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.
>
> (19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined.

20 Although Holmes is responsible for arranging for the distribution of the catalogs, all of these arrangements were made out of state. Holmes did not exercise *in Louisiana* any right or power over the *tangible personal property* once the tangible personal property existed, as required by La. Rev. Stat. Ann. 47:301(18). See discussion in Section I of this brief.

catalogs by Holmes at a magical "taxable moment" said to exist after the goods have completed their interstate journey and "come to rest" in the resident's mailbox but before the resident plucks them out of the mailbox. *McNamara* v. *D.H. Holmes Co.*, 505 So.2d at 105. This Court, however, has declared its intent to look beyond such formalisms and focus instead on the "practical effect" of the tax statute in question. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279. In reality, the tax in this case is levied on the movement by the United States Postal Service of promotional catalogs paid for by Holmes, created in New York City, and then printed in and mailed from Atlanta, Georgia, Boston, Massachusetts or Oklahoma City, Oklahoma. (Joint App. 57, 74, 80, 81, 83-87, 88, 90, 91).

The specter of the practical effects of such a tax call to mind the Court's statement in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940):

> Certain types of taxes may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations.

Id. at 48.

Likewise, in *Miller Bros.* v. *Maryland*, 347 U.S. 340 (1953), *reh'g denied*, 347 U.S. 964 (1954), the Court stated:

> We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State, nor do we see how such a tax could be consistent with the Commerce Clause.

Id. at 344.

If Holmes is held liable for the use tax because it effected a distribution of catalogs in Louisiana by virtue of arranging for mail to be sent into Louisiana by an out-of-state printer, the printer could also be liable for the use tax because it, as

the actual sender, even more directly effects the allegedly taxable Louisiana distribution. And if both the actual and the putative senders of these catalogs may be held liable for use tax in Louisiana, they and all other commercial senders and putative senders may be made liable for use tax in every state into which they direct promotional, informational or other similar material. That such taxes would place invidious restraints on commercial intercourse is clear, as each entity could be required to track each piece of mail sent. Under the Louisiana appellate court's decision, colleges could be required to pay use tax in Louisiana based upon the percentage of recruiting brochures or alumni fund-raising letters sent to residents there. Similarly, rural hospitals or small rural medical centers seeking doctors, as well as the search firms they engage to assist them in direct mail searches for personnel, could both be held liable for the percentage of the search letters "distributed" in Louisiana, assuming they had the requisite connection with the state to subject them to its taxing power.[21]

Moreover, communication by mail is not the only mode of interstate commerce which stands to be directly and unduly burdened by the Louisiana Court of Appeal's decision. Senders and putative senders of interstate radio, telephone, and television communications sent by cable from one state to another may similarly be liable for use tax in each of the states in which the communciation is received and through which the interstate communication passes.

Once it has been determined that the tax statute in question directly burdens interstate commerce, such burdens must be weighed against the benefit to the state of the challenged tax legislation. Even if the statute imposed only "incidental" burdens on interstate commerce,

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[21] The requisite nexus might be found if, for example, the out-of-state rural hospital is owned by a corporation which owns other hospitals in Louisiana, or if the hospital interviews prospective doctors in the state or participates in medical research there in conjunction with a Louisiana university or medical school.

> the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 *reh'g denied*, 450 U.S. 1027 (1981) (citation omitted) (*quoting Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)).

In this case, the state has no compelling health or safety interests which the challenged legislation protects. Even if the State would increase its revenues by levying the use tax in question, it must not be permitted to do so at the expense of the interests that the Commerce Clause is designed to protect.

Moreover, the State has no argument that Holmes does not already pay its "just share of the state tax burden" for the benefits and protections it receives from the state of Louisiana. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938). Holmes already pays all city and state taxes to which it is subject. (Joint App. 54, 65-66, 98). Holmes pays sales tax on all items it purchases or leases for use in its business. (Joint App. 65-66).[22] Indeed, to the extent Holmes' cost of producing the catalogs is reflected in the cost of goods sold, the State already receives its fair share connected to the in-state use of

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[22] Moreover, Holmes complies with its duty to charge and collect on catalog sales: "[A] tax is collected on any item that is purchased from the catalog. . . . If it's [sic] ordered by mail order form in them, such sales are "very small," only "one to two percent" of Holmes' total sales." (Joint App. 71-72). *National Bellas Hess* v. *Dep't of Revenue*, 386 U.S. 753 (1967), is therefore not applicable to this case. The questions before the Court in *Bellas Hess* concerned whether the requisite nexus existed for Illinois to require an out-of-state mail order house to collect use taxes owed by Illinois residents with respect to merchandise they ordered through the mail order house's catalog.

free promotional materials, for Holmes charges and collects Louisiana's sales tax on all of its retail sales. (Joint App. 128-129). Thus, it is clear that the local benefits to the State, if any, of upholding the challenged use tax are insufficient to counterbalance the excessive burdens on interstate commerce which such a tax entails.

As the analysis above demonstrates, the use tax at issue places invidious restraints on commercial intercourse and impermissibly burdens interstate commerce in violation of the Commerce Clause.

CONCLUSION

The judgment of the court below cannot be sustained under the Due Process Clause because the State of Louisiana seeks to levy a use tax upon an in-state taxpayer for its out-of-state activities. Louisiana's attempt to tax an activity lacking a substantial nexus with the State also violates the Commerce Clause under the *Complete Auto* test. Moreover, the attempt to tax one's ability to communicate through the use of the interstate mail system impermissibly burdens interstate commerce. Clearly then, the Louisiana use tax, as applied in this case, violates both the Due Process and the Commerce Clause of the United States Constitution.

The judgment below should therefore be reversed.

Respectfully submitted,

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December, 1987

No. 87-267.

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1987.

D.H. HOLMES CO., LTD.,
APPELLANT,

v.

CORRECTED COPY

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
APPELLEE.

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT, STATE OF LOUISIANA.

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF APPELLANT D.H. HOLMES CO., LTD.

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CASES.

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No. 87-267.

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D.H. HOLMES CO., LTD.,
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THE DEPARTMENT OF REVENUE AND TAXATION,
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BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF APPELLANT D.H. HOLMES CO., LTD.

Statement of Interest of Direct Marketing Association.

The Direct Marketing Association ("DMA") files this brief in support of the position of Petitioner, D.H. Holmes, Inc. ("Holmes"). Written consent of both of the parties to the filing by DMA as an *amicus* is on file with the Clerk's office of the Court.

Direct Marketing Association, Inc. (DMA), a New York not-for-profit corporation, is the largest and oldest national trade association representing companies involved in direct-to-the-consumer mail advertising and marketing. DMA's membership totals more than 3,200 firms located in all 50 states and 40 foreign countries. A majority of the association's members are mail order houses. Members range in size from small enterprises, including operations that continue to prepare their catalogs on kitchen table tops, to "Fortune 500" companies.

As an association that consists of many businesses that sell only by use of the means of interstate commerce, DMA is concerned about language in the decision of the Louisiana Court of Appeals suggesting that the constitutional requirement of nexus may be established by the presence of customers in the taxing state and the sending of advertisements and other materials by the instrumentalities of interstate commerce to residents of the taxing state. This Court has repeatedly held that the presence of customers in the taxing state, the sending of advertising materials to residents of the state and the delivery of goods into the state are *not* factors indicating nexus. If nexus for purposes of a direct use tax is based upon any of these factors, then such factors could be used to establish nexus for purposes of use tax collection as well. Thus, mail order houses that do an interstate business but have no physical presence in the state may be required to collect the use tax in the 45 states and 7,000 local jurisdictions that have sales and use tax statutes. The administrative burden and expense would have a far-reaching effect on interstate commerce. DMA submits this brief to explain why the Louisiana Court's views of nexus should be rejected by the United States Supreme Court.

Summary of Argument.

Nexus with the taxing state is the necessary constitutional link to justify a state's imposing a use tax on a taxpayer, as was done by the Louisiana Department of Revenue on Holmes in the instant case (a "direct use tax"). Nexus is also required in the situation where a state requires an out-of-state company to collect a use tax on behalf of the state from the actual in-state users of the goods, as was the situation presented in *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753 (1967). For the direct use tax, the state must establish a nexus between the state and the activity that is the subject of taxation. However, for use tax collection purposes, nexus is established by looking at all the activities of the company within the state, regardless of whether such activities themselves are subject to the tax. *National Geographic Society* v. *California Board of Equalization,* 430 U.S. 551, 560-561 (1977).

The language of the Louisiana Court of Appeals decision suggesting that nexus can be established by the presence of customers in the taxing state and the mailing of advertising materials to residents of the state is flatly inconsistent with the long line of decisions of this Court interpreting the Commerce Clause and the Due Process Clause of the U.S. Constitution. The Court has consistently held that a state may impose a tax on an activity in connection with interstate commerce *only* if the activity itself is conducted within the state. Similarly, this Court has held that for use tax collection purposes, nexus requires that the taxpayer do business in the state through the maintenance of facilities, property, goods, employees, agents or other representatives in the state. However, connections with the taxing state through the mails, interstate means of transportation, and advertisements directed to its residents, along with delivery of goods to residents of the state by common carrier, are not factors to establish the nexus required by

the Constitution either for purposes of the direct use tax or use tax collection.

The Court has adopted this definition of nexus in order to reconcile the competing interests of the states in obtaining tax revenues and the national interest of a single, open economy as embodied in the Commerce Clause. If the overly broad position of the Louisiana Court of Appeals regarding nexus were adopted by this Court, the delicate balance drawn by this Court in weighing the revenue needs of the states and the maintenance of an open, national market would be upset. In fact, the time-honored principle of nexus would be rendered meaningless.

The mere distribution of printed matter through the mails or the delivery of goods by other instruments of interstate commerce should not be deemed sufficient to justify either imposition of a use tax or delegation of tax collection responsibilities. Adoption of the Louisiana Court's application of nexus principles would place on companies such as mail order houses the overwhelming administrative burden and expense of complying with the laws of the 45 states and 7,000 local governments that have sales and use tax laws. Interstate commerce would be immutably harmed as a result.

Argument.

THE CONSTITUTIONAL REQUIREMENT THAT A STATE HAVE "NEXUS" WITH AN ACTIVITY IT SEEKS TO TAX IS SATISFIED ONLY WHEN THE TAXPAYER CONDUCTS THE TAXABLE ACTIVITY WITHIN THE STATE; THE PRESENCE OF CUSTOMERS WITHIN A STATE AND THE DISTRIBUTION OF ADVERTISING MATERIALS AND OTHER ITEMS BY MAIL AND COMMON CARRIER INTO A STATE DO NOT ESTABLISH NEXUS.

The threshold criterion for determining the constitutionality of state taxes assessed on activities in connection with interstate

commerce or imposed upon a company or person located outside the state is "nexus." Nexus is the constitutional prerequisite for a state to impose a tax, whether it is the state's income tax on a non-resident;[1] or a gross receipts or occupation tax on the activities of a company engaged solely in interstate commerce;[2] or the deputization of an out-of-state firm to collect the state's use tax.[3] Nexus is necessary to satisfy the requirements of both the Commerce Clause and the Due Process Clause of the Constitution. *Container Corp. of America* v. *Francise Tax Bd.*, 463 U.S. 159, 164 (1983).

The question of whether nexus exists can arise in the case of a use tax in two contexts. First, the tax may be a direct tax on the taxpayer's use of a product in state. Louisiana in this case has imposed a direct tax on Holmes. Second, a state may seek to deputize an out-of-state company *to collect* the use tax for the use of goods by residents of the state. This question primarily arises in the case of mail order houses. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967).

For a direct tax, such as a direct use tax, the Court has required a substantial nexus between the taxing state and the "use" — the taxable activity. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977) (holding that a direct sales tax on Complete Auto Transit required a substantial nexus between the taxing state and the taxable activity). Cf. *National Geographic Society* v. *California Board of Equalization*, 430

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[1] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 464 (1959); *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 445 (1940).

[2] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977); *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978).

[3] *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 556 (1977); *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967).

U.S. 551, 560-561 (1977) (drawing a distinction between direct tax cases, where the nexus must be established with the taxable activity itself, and use tax collection cases, as presented in *National Geographic*, where the nexus can be established with the taxpayer by considering *all* the activities of the taxpayer in the taxing state). For use tax collection purposes, nexus must be established between the state and the out-of-state company. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 561 (1977). In either type of case, the "target" of the state's taxing authority — the transaction subject to tax in the case of a direct tax and the company's business operations in the case of a duty to collect the use tax — must have the requisite nexus, i.e., connecting link, with the state. For both types of cases, nexus must result from the in-state presence of the target of the state's taxing authority. For both, this Court has ruled that the presence of customers in a state, the sending by mail of advertisements to the state and the delivery by common carrier of goods to residents of the state are *not* factors to establish nexus.

The Louisiana Court of Appeals' opinion in this case suggests, however, that the nexus requirement may be satisfied by the presence of customers of the taxpayer in the taxing state. *McNamara* v. *D.H. Holmes Co., Ltd.*, 505 So.2d 102, 106 (La. App. 4th Cir. 1987).[4] The opinion also indicates that

[4]The lower court found as follows:

> The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the total number of catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street Store.

The court appears to state that nexus may be based upon the presence of Holmes' customers in the State. This may not be part of the court's holding and simply an additional observation, for the maintenance of retail stores in a

nexus can be based upon the distribution through the mails or by common carrier of advertising materials to residents of the taxing jurisdiction. *Id.* at 105.

In the case at bar, the taxpayer maintains retail stores and employees in Louisiana. Although Holmes is clearly conducting business activities within the state, this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), recognized that in the case of a direct tax the Commerce Clause requires that "the tax is applied to *an activity* with a substantial nexus with the taxing state." (Emphasis added) Similarly, in *American Oil Co.* v. *Neill*, 380 U.S. 451, 458 (1965), the Court held that even if a company is doing business within the state, it would violate the Due Process Clause if the state imposed a tax on a transaction involving "no in-state activities". This Court in *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 560-561 (1977), reaffirmed the principle set forth in *American Oil* that a "direct tax" on a transaction will be sustained only when there is both a nexus between the seller and the state and a nexus between the activity taxed and a seller's activity in the state.[5]

The use tax Louisiana imposed on Holmes is a direct tax on Holmes' mailing of catalogs to Louisiana residents. As Holmes will argue in its brief, Holmes was not conducting any business activities within Louisiana in connection with the transaction sought to be taxed by Louisiana — the distribution of catalogs. Holmes used the U.S. mail to send its catalogs

state alone is sufficient to provide nexus to the taxpayer. On the other hand, it may be an element of nexus relied on by the court. It is this interpretation of the lower court's opinion that raises one of the concerns addressed in this brief.

[5]The *National Geographic* Court, however, did hold that an out-of-state company may be required to collect the state's use tax without a showing of the connection between the company's in-state presence and the *particular* transaction taxed. 430 U.S. at 561.

to Louisiana residents. Holmes neither took possession nor control of the catalogs in Louisiana. Therefore, the necessary nexus to the taxable transaction is not satisfied in this case.[6]

This brief examines the essential elements of the nexus standard and discusses the mischaracterization of these elements by the lower court.[7] The lower court's interpretation of what can constitute nexus is directly contrary to a long line of Supreme Court decisions interpreting the Commerce Clause and Due Process Clause requirements. Indeed, the effect of adopting this overly broad view of nexus would be to abandon any limits on state taxing authority, by virtue of the Commerce Clause and Due Process Clause, in the areas of direct use tax and use tax collection.

[6]Holmes mailed the catalogs that were subject to the Louisiana use tax. Once items are placed in the mail, the sender can exercise no control over them. 18 U.S.C. § 1708; 39 C.F.R. § 152.77. Thus, Holmes relinquished all control over the catalogs at the places from which they were shipped.

[7]An additional question in this case which this brief will not address in detail is whether the use tax imposed by Louisiana can be sustained under the Commerce Clause, because there is a risk of multiple taxation. The tax imposed by Louisiana on distribution of the catalogs is a tax on goods in the course of interstate commerce, since the taxpayer's only distribution of the items was by use of an instrument of interstate commerce, the U.S. mail. At no time did the taxpayer control or take possession of the catalogs in Louisiana. Once the catalogs reached the mailbox of the Louisiana resident — the only connection to Louisiana — it was only the Louisiana resident, and not the taxpayer, that decided what to do with the catalogs. If Louisiana could impose a use tax on distribution, so could every state through which the mail passes. This would expose interstate commerce to possible multiple tax burdens. P. Hartman, *Federal Limitations on State and Local Taxation* § 2.18 (1981); J. Hellerstein, 1 *State Taxation* § 4.11 (1983). Therefore, even though there is no evidence of *actual* multiple tax burdens in the case at bar, this Court has recently held that it is the *possible* risk of multiple taxation that constitutes grounds for invalidating a state tax on Commerce Clause grounds. *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, U.S. , 107 S.Ct. 2810, 2817 (1987); *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984).

A. *The Nexus Requirement of Carrying on In-State Business Activities Establishes the Proper Balance between the State's Interest in Taxation and the Constitutional Limits of a State's Power To Tax.*

The primary goal of the Commerce Clause and its interplay with the Due Process Clause is to secure a unified, national market unimpeded by state-imposed burdens and restraints against trade across state lines. P. Hartman, *Federal Limitations on State and Local Taxation* §§2.2, 2.3 (1981). At the same time, in our federal system a state has a legitimate interest in taxing business activities that occur within its borders. The sovereign interests of a state, however, must stop at its borders. This Court has established the nexus standard of in-state business activities, "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual states in exercising their taxing powers." *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329 (1977). See also *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 48 (1940) (the question of whether a tax on interstate activities is permissible requires courts "to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed").

The "very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). The Supreme Court, therefore, has long recognized the need to protect the national economy against state laws insufficiently related to activities within the taxing state. *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946) (the "Commerce Clause . . . is a limitation upon the power of the States"). Thus, in a case involving a severance tax on raw materials, the Court held that the "inter-

state business must have a substantial nexus with the State . . . and the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of tax burden.'" *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981), quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-441 (1964) (question under Commerce Clause is whether the state has exerted its power in proper proportion to appellant's activities within the state).

Just as a state in our federal system has broad powers to tax activities occurring within that state, it is "impotent" under the Due Process Clause to tax business or activities conducted outside its borders. *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444-446 (1940); *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 80-81 (1938).[8] In the case of an income tax, for example, a state "may not tax value earned outside its borders." *Asarco, Inc.* v. *Idaho*, 458 U.S. 307, 315 (1982). The Court has required that a tax may be sustained under the Due Process Clause only when there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 345 (1954). Thus, as this Court has recently stated in considering the constitutionality of a state income tax on a nonresident corporation, "[t]he requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State."

[8]Holmes conducted no activities in Louisiana in connection with the transaction taxed — the distribution of catalogs. Its involvement was merely to cause the catalogs to be placed in the U.S. mail from points outside Louisiana. Since the sender relinquishes control over an item once given to the Post Office, Holmes had no control over the catalogs once they left interstate commerce, i.e., were placed in the mailboxes of the Louisiana residents.

Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425, 437 (1980), quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. at 444-445. See also *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 166 (1983) (Due Process nexus "imposes the obvious and largely self-executing limitation that a State not tax . . . [a business] unless at least some part of it is conducted in the State"); *Exxon Corp.* v. *Department of Revenue*, 447 U.S. 207, 208 (1980) (Due Process nexus established "if the corporation avails itself of the substantial privilege of carrying on business within the State").

In short, it is only when local business activities are conducted that the necessary constitutional nexus is present. In such situations, the taxing power exerted by the state "bears fiscal relationship to protection, opportunities and benefits given by the state" to the taxpayer, *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940), and, therefore, the state's interest in taxation outweighs the limits on the state's power under the Constitution. As stated in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 627 (1981):

> *When a tax is assessed in proportion to a taxpayer's activities or presence in a State*, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." [quoting *Exxon Corp.* v. *Department of Revenue*, 447 U.S. 207, 228 (1980), emphasis added.]

When, however, there is no presence within the state, the state's interest in taxation is outweighed by the national interest. Where the firm is not carrying on business activities within the state, the tax is an attempt to reach "extraterritorial

values"; thus the tax "does not bear the necessary relationship to opportunities, benefits, or protections conferred or afforded by the taxing State." *F.W. Woolworth Co.* v. *Taxation & Revenue Dept.*, 458 U.S. 354, 372 (1982) (quoting *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U.S. 317, 325 n.5 (1968).

B. *The Presence of Customers in a State and the Distribution of Advertising Materials and Other Items by U.S. Mail and Common Carrier into a State Does Not Constitute Sufficient Nexus To Permit the Direct Imposition of a Use Tax on Advertising Materials or the Delegation of a Duty To Collect Sales or Use Taxes from Customers.*

Nexus standards in tax cases have been well developed by this Court in its line of use tax collection decisions. In these cases, the Court has held that the presence of customers and the delivery of merchandise and advertisements by U.S. mail and common carrier do not constitute nexus. Therefore, neither should these factors constitute nexus for the purpose of imposing a direct use tax.

In use tax collection cases, the Court has drawn a clear line between firms that have offices, property or agents, such as solicitors in the taxing state, and those firms which do not have such local presence. As the Court stated in *National Bella Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967), there is a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."

In *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941), the Court considered one of the first challenges to the constitutionality of imposing use tax collection duties on retailers.

There, the Court clearly distinguished between a mail order firm that has a local office and a concern that does not have such a presence within the state. The mail order firm with a local office, according to the Court, could be required to assume the burden of local tax collection "as a price of enjoying the full benefits flowing from" maintenance of the office. *Id.* at 364. A firm that does not maintain an office, however, is "not receiving benefits from" the taxing jurisdiction for which the state "has the power to exact a price." *Id.* at 365. That the state could not obligate the mail order concern to collect its taxes is "a result of the impotence of state power." *Id.* at 364, quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435 (1940).[9]

In *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954), a Delaware vendor, located just over the state line from Maryland, had significant sales to Maryland residents from its Delaware store. In fact, for certain purchases over a specified amount, employees of Miller Bros. made deliveries into Maryland with company-owned delivery trucks. In addition, the Delaware retailer advertised in Delaware-media, which were distributed to and received by Maryland residents. Miller Bros. also mailed announcements of various sales and promotions to Maryland residents. Notwithstanding these contacts with Maryland residents, the Court ruled that there was an insufficient nexus between the Delaware vendor and Maryland to justify imposition on Miller Bros. of the duty to collect the use tax. The Court stated that the "burden of collecting or paying" the use tax "cannot be shifted to a foreign merchant in

[9]To similar effect are the decisions in *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 375 (1941) (maintenance of local retail outlets); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 209 (1960) (retention of ten brokers (solicitors) in the taxing jurisdiction); *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 561 (1975) (employee located in state made possible the "realization and continuance of valuable contractual relations" for the taxpayer, the proceeds from which contracts were taxed).

the absence of some jurisdictional basis not present here." *Id.* at 347. The "definite link" necessary to provide "an adequate basis for taxation" would be present, according to the Court, where the retailer or its employees or agents maintain a "domicile or residence, more substantial than mere presence in transit or sojourn." *Id.* at 344-345. The connection to the state required by the Due Process Clause simply was not present in that case. *Id.* The Court ruled against Maryland despite the dissenting opinion which argued that there were substantial connections with Maryland, since there had "been a course of conduct in which the appellant has regularly injected advertising into media reaching Maryland customers and regularly effected deliveries within Maryland by its own delivery trucks and by common carriers." *Id.* at 358.

The majority's opinion in *Miller Bros.* regarding the level of contacts necessary to satisfy the nexus standard is directly contrary to the suggestions in the Louisiana Court of Appeals decision that nexus can be based on sales to residents of Louisiana and the distribution of advertising materials to them. This Court has clearly drawn a line between, on the one hand, visits to a taxing state by employees using company-owned property and advertising directed to residents of that state (i.e., the *Miller Bros.* situation which did not create nexus for use tax collection purposes), and, on the other hand, "active and aggressive operation within a taxing state" by running a retail store, as in *Nelson* v. *Sears, Roebuck & Co., supra,* or an "out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers" in the case of *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335 (1944). 347 U.S. at 346-347. Thus, it is only where "a corporation, pursuant to permission given, enters a State and proceeds to do business" will the definite link to sustain

a direct tax on the business or to uphold use tax collection be found. *American Oil Co.* v. *Neill,* 380 U.S. 451, 458 (1965).

The *Miller Bros.* holding was specifically reaffirmed in *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753, 758 (1967). In that case, the Court held that a mail order firm that does not maintain retail outlets, property or solicitors within a state is immune from that state's taxing authority. *Id.* at 758. As the Court stated, "[t]he case in this Court which represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto*," where "the seller had ten wholesalers, jobbers or salesmen conducting continuous local solicitation." *Id.* at 757. By a six to three majority, the Court struck down the Illinois statute.

In a vigorous dissenting opinion, Justice Fortas, joined by Justices Black and Douglas, argued that the presence of customers in a state and the solicitation of such customers by advertisements in the mail constituted sufficient nexus. According to Justice Fortas, National Bellas Hess was exploiting "the consumer market of Illinois . . . by soliciting residents of Illinois who live and work there and have home and banking connections there. . . . Bellas Hess could not carry on its business in Illinois, and particularly its substantial credit business, without utilizing Illinois banking and credit facilities." The majority, however, refused to accept the dissent's argument that National Bellas Hess was enjoying "the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein." *Id.* at 762.

The principle that the substantial nexus required under the Commerce and Due Process Clauses is satisfied only by presence within the state remains good law. In *National Geographic Society* v. *California Board of Equalization,* 430 U.S. 551, 559 (1977), the Court specifically approved the distinction

drawn in *National Bellas Hess* and other Supreme Court decisions between mail order firms with a physical presence in the state and those whose connection with the jurisdiction consisted solely of conducting an interstate business. Because the National Geographic Society maintained two offices in California, the state was allowed to impose the duty to collect the tax. *Id.* The Court, however, declined to adopt the California Supreme Court's test that the "slightest presence" within a taxing state was sufficient under the Commerce and Due Process Clauses, lest virtually every out-of-state seller would be made liable for the use tax. *Id.* at 555.

This Court has recently noted the relevance of its application of nexus principles in use tax collection cases to nexus requirements in direct taxation cases. In *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, U.S. , 107 S.Ct. 2810, 2821-2822 (1987), a case concerning the State of Washington's gross receipts tax, the Court cited its use tax collection decisions in *Scripto* and *National Geographic* in confirming that "the crucial factor governing nexus is whether *the activities performed in this state* [the taxing state] *on behalf of the taxpayer* [by its in-state sales representative] are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." (Emphasis added, quoting Washington Supreme Court opinion.)[10]

[10]The Court has also cited *National Bellas Hess* as providing the appropriate nexus standard under the Commerce Clause and Due Process Clause to determine the validity of other state taxes. See, e.g., *Asarco, Inc.* v. *Idaho*, 458 U.S. 307, 316 (1982); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981); *Exxon Corp.* v. *Department of Revenue*, 447 U.S. 207, 219-220 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 436-437 (1980); *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 273 (1978).

C. *Adoption of a Nexus Standard Based on the Presence of Customers in a State and the Distribution of Materials through the Mail or by Other Instruments of Interstate Commerce Would Render Meaningless the Clear Constitutional Limitations on a State's Power to Tax, Particularly in the Case of a Mail Order House.*

As discussed above, the approach to nexus suggested by the Louisiana Court of Appeals, in essence, would abandon the clear principle adopted and followed in a long line of cases interpreting the Commerce and Due Process Clauses to limit a state's taxing power to activities conducted by the taxpayer within the state. Although use tax collection was not at issue in the lower court's decision, under the lower court's approach to nexus a company, wherever located, which had sold merchandise to residents of a distant state or circulated materials by common carrier there, would be subject to the duty to collect the state's use tax, regardless of the fact that the company itself had maintained no offices, property, employees or agents in the state and irrespective of the fact that the company had not been reaping any of the benefits or protections of the taxing state. For an interstate trader such as a mail order house that sells and sends its catalogs throughout the United States, this definition of nexus would require the collection and remittance of sales and use taxes on its sales of merchandise to residents throughout the United States and would require the payment of use taxes on the value of advertising materials sent throughout the United States.

Abandonment of traditional Commerce Clause and Due Process Clause limitations upon a state's authority to extend its taxing authority beyond its borders would impose a heavy and disproportionate administrative burden and expense on

mail order firms, even though the mail order companies receive no benefit from the local tax revenues they would be asked to collect and remit to the states. It would, in effect, penalize interstate commerce and lessen the ability of mail order companies to offer the unique service which they provide to American consumers.[11] A mail order house would be forced to collect use taxes in the 45 states and more than 7,000 local jurisdictions in the United States having such taxes[12] and would be required to pay use taxes to each of these jurisdictions on

[11] Since the early 19th century, mail order companies have provided a unique and important service to certain segments of the American public. To residents of rural areas, mail order compensates for their remoteness from urban retail centers. To the aged and handicapped who are home-bound, mail order brings the marketplace to their door. To working couples who lack the time or child care arrangements for store shopping, mail order is a quick and efficient way of making their purchases. Moreover, mail order enriches the diversity of goods available to people in widely-separated regions of the country. The free and open market made possible by the Commerce Clause has made these developments possible.

[12] The Advisory Commission On Intergovernmental Relations, a non-partisan Congressionally authorized body, has examined the issue of state and local taxation of interstate mail order sales in the context of possible federal legislation. In its Executive Summary dated August 26, 1985, the ACIR recognized the significance of several controverted issues, including compliance burdens on mail order companies:

> *Heavy Compliance Burdens*: The mail order firms would be forced to shoulder extraordinary compliance burdens if they are required to comply with the differing tax code provisions of 45 states and 7,000 local governments that are now imposing sales taxes.

(Page 2 of Executive Summary, dated August 26, 1985.) Consequently, in its recommendations for federal legislation on this subject, "in order to minimize compliance costs for firms operating in multiple jurisdictions," the ACIR proposed that a "non-discriminatory single rate" be established. (Recommendation of Advisory Commission On Intergovernmental Relations, dated September 20, 1985.)

the value of materials mailed to addresses within these jurisdictions. The costs and problems to direct marketers would be substantial, and would have a deleterious effect on the mail order industry.

The dilemma and hardship a mail order firm would encounter if it were required to collect the sales and use tax in a large number of states and localities were underscored by the Court in *National Bellas Hess*, 386 U.S. at 759-760:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost to the local government."
>
> The very purpose of the Commerce Clause was to insure a national economy free from such unjustifiable local entanglements. [Footnotes omitted.]

The point is not whether tax collection is possible. The question is whether there is any reason to reverse the U.S. Supreme Court's decisions which are based on fundamental principles of federalism. A state may not export to a foreign company that does not do business within the state's borders

the type of administrative burden that would occur if the Louisiana Court of Appeals' approach to nexus were adopted. The practical effect of this radical approach would hold hostage the privilege of participating in the national market created by virtue of the Commerce Clause.

Conclusion.

This Court has repeatedly required a presence in the taxing state of the target of taxation to establish the nexus standard under the Commerce and Due Process Clauses. This standard is based on the delicate balance between the states' powers to tax and the interest in a national market. This time-honored principle should not be disturbed.

Respectfully submitted,

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December 24, 1987

Supreme Court, U.S.
FILED
FEB 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

In The
Supreme Court of the United States
October Term, 1987

D. H. HOLMES CO., LTD.,
Appellant,

V.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION
THE DEPARTMENT OF REVENUE
AND TAXATION,
STATE OF LOUISIANA,
Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit,
State of Louisiana**

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE SHIRLEY McNAMARA, SECRETARY, LOUISIANA DEPARTMENT OF REVENUE AND TAXATION

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February 5, 1988

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QUESTION PRESENTED

The pertinent Question Presented for decision, as stated by the Appellant (Brief of Appellant, page i.) with the modification suggested by Appellee (Motion to Dismiss or Affirm, page i.) would be properly stated as follows:

> Whether provisions of Louisiana use tax law, La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A)(2) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against Appellant a tax on the merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana residents, free of charge to the recipients.

PARTIES TO THE PROCEEDING

The parties to the proceeding are D. H. Holmes Co., Ltd., the Appellant, and Shirley McNamara, Secretary of Revenue and Taxation, Department of Revenue and Taxation, State of Louisiana, the Appellee.

Amicus Curiae, Multistate Tax Commission, is a state government instrumentality and has no parent company, subsidiaries or affiliates to list pursuant to Supreme Court Rule 28.1.

CONSENT

The parties have given their consent pursuant to Rule 36.2 of the Supreme Court Rules to the filing of this *Amicus Curiae* brief. Copies of the letters of consent are on file with the Clerk of the Court.

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Advisory Commission on Intergovernmental Relations, Report No. A-105, State and Local Taxation of Out-of-State Mail Order Sales (April 1986) 4

Caplan, "Telemarketing-Inbound", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) 16

Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993 (1986) 19

Hartman, *State Taxation of Corporate Income From a Multistate Business*, 13 Vand. L. Rev. 21 (1957) 18

McCray, *Commerce Clause Sanction Against Taxation on Mail Order Sales: A Re-evaluation*, 17 Urb. Law. 529 (1985) 17

McCray, *Overturning Bellas Hess: Due Process Considerations*, B.Y.U. L. Rev. 265 (1985) 20

E.L. Nash, *Direct Marketing Strategy, Planning and Execution* (1982) 22

Passavant, "Direct Marketing Strategy", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) 3

No. 87-267

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In The

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D. H. HOLMES CO., LTD.,

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BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE SHIRLEY McNAMARA, SECRETARY, LOUISIANA DEPARTMENT OF REVENUE AND TAXATION

—o—

STATEMENT OF INTEREST OF AMICUS CURIAE MULTISTATE TAX COMMISSION

The Multistate Tax Commission ("MTC") is the official administrative agency of the Multistate Tax Compact ("Compact"). Currently, the Compact has been entered into by 18 states and the District of Columbia as full members; and 10 additional states have joined the

Commission as associate members.[1] The States of Florida, Illinois, Indiana, Maine, Nebraska, Nevada, Oklahoma, and Vermont have also joined with MTC states in a special project, referred to as the MTC National Bellas Hess Project, in an attempt to address the more serious use tax collection problems that arose from the Court's decision in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

The stated purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

As reflected by these four basic principles, the MTC possesses vital and continuing interests that transcend the resolution of the factual questions presently before the Court. As a result of this Court's opinions in the area of nexus for direct taxation, for use tax collection purposes, and for other aspects of a state's jurisdictional power over persons and transactions, some confusion has arisen with regard to the obligation of out-of-state direct marketers to collect the use taxes imposed by the states into which the

[1] The current full members are the states of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania and Tennessee.

marketer is purposefully selling its goods. It is recognized that the occasional sale or delivery of goods, without purposeful solicitation of the consumer market by the out-of-state merchant, may not create a sufficient connection with a state to require use tax collection. However, when the level of the out-of-state direct marketer's activities is beyond the occasional solicitation of sales, those activities result in substantial equivalence to those being conducted by the local merchant. Then, an exploitation of the state's market is the result.[2] That exploitation fairly justifies requiring the out-of-state direct marketer to collect the state's use tax. Therefore, the MTC finds it to be of continuing importance to present its underlying position as to the application of the Due Process Clause and the *National Bellas Hess* decision to cases such as that presently before the Court.

The MTC is concerned that the states be able to stanch the substantial current loss of use tax revenues to which they are lawfully entitled. That loss is caused by their in-

[2] It is noteworthy that direct marketing consultants recognize the parallels that occur between types of direct marketing solicitation and retail store operations. For example, one such consultant has defined the term "catalog" as follows:

> *Catalog.* This is an offer of an assortment of merchandise from which the prospect may select one or more items. The catalog may remain in force for months and sometimes for more than a year. This method of selling is applicable when there is a relatively broad assortment of items to be offered to a target audience. In the consumer sector such items are frequently of a discretionary nature, while in the industrial sector such items often represent recurring supply needs within a particular product area. *A catalog is most analogous in concept to a retail store which displays a variety of merchandise and invites customers to make selections.*

Passavant, "Direct Marketing Strategy", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) at 11.

ability either to collect the tax directly from their residents or to require the out-of-state direct marketers to do so.[3] To the extent that the Court's decision in this case might negatively affect the states' efforts in this regard, the MTC desires to submit its brief to assist the Court in its exploration of the applicability of the Due Process Clause in this matter.

The states, individually through their own efforts, jointly through interstate agreements, through their shared efforts in support of pending Congressional legislation, and through joint efforts such as the MTC's National Bellas Hess Project, are attempting to develop direct responses to the serious problems addressed by this Court and, more recently, by the Advisory Commission on Intergovernmental Relations ("ACIR"). The ACIR estimates that in excess of $1,400,000,000 in use taxes annually escape collection from mail order sales due to the actual or perceived prohibition contained in the *National Bellas Hess* decision.[4]

The MTC is vitally interested in assisting the states in convincing this Court that it should substantially limit, if not completely disapprove of its prior decision in *National Bellas Hess* to the extent that its holding was premised upon the Due Process Clause. However, the

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[3] *Amicus Curiae* American Retail Federation concedes that a state's attempt to collect the use tax from the recipient of the goods (catalogs here) "would be administratively unworkable". (Brief of *Amicus American Retail Federation* at 13, n.9). Unless the out-of-state direct marketer is required to collect the use tax owed by its customers upon its sales into a state, such administrative unworkability would prevent the remittance of the tax.

[4] ACIR Report No. A-105, State and Local Taxation of Out-Of-State Mail Order Sales (April 1986), Table 2-3, pp. 30-31 as supplemented by Staff Information Report (SR-5) (September 4, 1987).

parties to this case, reasonably not anticipating any need to do so, did not develop a record upon which the Court could re-examine its *National Bellas Hess* decision in light of modern technologies in the direct marketing and computer areas. But, even despite Holmes' decision not to raise any Due Process Clause claim that would permit the Court to examine that issue; and despite the lack of a record that would have been developed for such an examination, *Amici Curiae* Direct Marketing Association and American Retail Federation now attempt to inject a Due Process Clause issue into this case.

The states' ability to require out-of-state direct marketers to collect use tax from their in-state customers rests, in substantial measure, upon this Court's current view of the validity and scope of the *National Bellas Hess* holding. Additionally, a crucial key is this Court's continuing development of its standards concerning the kind and extent of activities which are required for a state to impose personal jurisdiction over a non-resident. The reason is that such standards should apply with equal force to nexus considerations for the imposition of a use tax collection duty.

Amici Curiae Direct Marketing Association and American Retail Federation, by raising the Due Process Clause as they have, indirectly seek the Court's reaffirmation of the nexus holding adopted in the *National Bellas Hess* decision. Even though *Amicus Curiae* American Retail Federation suggests that, since Holmes collects use tax on its catalog sales, the holding in the *National Bellas Hess* case "is therefore not applicable to this case," a substantial portion of its *Amicus* brief supports the continued application of the nexus principles established in the *National Bellas Hess* case. Brief of *Amicus Curiae* American Retail Fed-

eration at 25, fn. 22. *Amicus Curiae* Direct Marketing Association, if it could convince this Court that it should decide this case in Holmes' favor upon Due Process Clause grounds or upon a reaffirmation or expansion of the nexus holding in *National Bellas Hess*, would succeed in further insulating from use taxation, as a practical matter, massive interstate sales by a large segment of its membership. That result would continue the patently unfair situation in which the in-state retailers must collect and remit the tax and suffer the substantial competitive price disadvantages that result therefrom.

In this context, it is obvious that *Amici Curiae*, including the MTC, possess interests far beyond the particular facts and outcome of this case. The Court's holding or *dicta* will either feed or dowse the flames of arguments being advanced by non-parties to this case in other arenas, such as before Congress or in the course of other litigation presently working its way through the state judicial systems. If the Court were to express its opinion here regarding the continued vitality of the *National Bellas Hess* decision or as to the extent of its application or as to the basis upon which that case was decided, that expression would affect all state taxing jurisdictions, thousands of direct marketers, and, quite possibly, decisions of Congress with regard to the pending legislation. Therefore, the MTC is vitally interested in arguing that the Court should not here address the Due Process issue, which has been raised by no one other than the *Amici*, but should defer consideration of that issue until it has the opportunity to consider a fully developed record.

However, if the Court wishes to address in this case either the Due Process Clause issue or the application of

the *National Bellas Hess* decision to the facts herein, the MTC hereby offers its arguments. Its position is that both recent technological advances and recent decisions of this Court dictate either a restriction on the applicability of the *National Bellas Hess* decision or disapproval of it.

STATEMENT OF THE CASE

D. H. Holmes Company, Ltd. ("Holmes") is a corporation organized under the laws of Louisiana and has its principal and registered office in New Orleans, Louisiana (Joint Appendix ("J.A.") 2-3, 11). Holmes is engaged in retail sales from its 13 department stores located throughout Louisiana (J.A. 68). It has in excess of 450 separate telephone listings in the greater New Orleans area (J.A. 35-37).

Through the Frederick Calkins Buying Organization, Holmes contracted for the design and printing of catalogs promoting its retail goods (J.A. 70-71). During the tax period in question, 82% of these catalogs, all of which were printed outside Louisiana, were mailed via the United States Postal Service by the printer, at Holmes' direction, to Holmes' customers residing in Louisiana (J.A. 73-74, 80-81). These catalogs were designed and intended for use in promoting Holmes' retail business; and the facts presented do not involve the operation of a mail order business or the question of whether Holmes had a duty to collect Louisiana's or any other state's use tax on any mail order sales.

Louisiana imposes a tax upon ". . . the use, the consumption, the distribution . . . in the state of each item or article of tangible personal property . . .". La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A)(2). The tax at

issue here was imposed upon Holmes' use of the catalogs mailed to its Louisiana customers and measured by the cost thereof to Holmes. The Louisiana Secretary of Revenue and Taxation sought to enforce its use tax statutes by instituting an action to collect the tax from Holmes in Civil District Court of Orleans Parish. (J.A. 2-7).

The trial court sustained the assessment (Jurisdictional Statement on Appeal ("J.S.App.") 12A-15A), reasoning that the catalogs "were directed toward residents of Louisiana and were intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana". (J.S.App. 21). The trial court found that the imposition of the tax was valid under the four-part test referred to by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (J.S.App. 21A-22A). The trial court's decision was affirmed by the Louisiana Court of Appeal, Fourth Circuit. *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 1987), *cert. den.* 506 So.2d 1224 (1987). (J.S.App. 2A-11A).

Holmes' sole federal constitutional objection to the imposition of the tax has been limited to the Commerce Clause of the United States Constitution (J.A. 11-13; J.S. App.i; Brief of Appellant (i)).

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SUMMARY OF ARGUMENT

I. RULE 15.1 OF THE SUPREME COURT RULES PRECLUDE AMICUS CURIAE FROM RAISING NEW ISSUES ON APPEAL THAT WERE NOT RAISED BY THE PARTIES.

Holmes has not, at any stage of these proceedings, raised the argument that the tax in question violates the Due Process Clause of the United States Constitution.

This argument is first raised in the *Amicus Curiae* briefs of the American Retail Federation and the Direct Marketing Association.

Rule 15.1 of the Rules of the Supreme Court limits the questions to be considered by this Court on appeal to those "set forth in the jurisdictional statement or fairly included therein." This Court has been consistently vigilant regarding the application of Rule 15.1 so as to prevent parties from raising issues that have not been properly raised or decided by the courts below. It should not allow the *Amici* to raise the Due Process issue here.

II. THE NEXUS REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS FULLY SATISFIED WHEN SOLICITATIONS OF SALES ARE PURPOSEFULLY DIRECTED BY ANY MEANS OF COMMUNICATION TO THE RESIDENTS OF A STATE.

If the Court were to consider the application of the Due Process Clause to this case or the extent to which the *National Bellas Hess* decision bears upon the issues here or even whether that decision remains good law today, several arguments should be considered by the Court in light of the vast technological advancements in the area of interstate marketing that have occurred over the past twenty years. These arguments will demonstrate that the *National Bellas Hess* decision should no longer be relied upon to prohibit the states from imposing a use tax collection duty upon the direct marketers who purposefully direct their sales solicitation campaigns into a state by mail, telephone, television, radio, computer, catalogs, newspapers, magazines or any other type of media.

The Court's decision in the *National Bellas Hess* case appears to have been based solely upon Commerce Clause considerations. This Court has suggested that, in this area, "Congress alone has the power of regulation and control." *National Bellas Hess,* 386 U.S. at 760. As such, Congress remains free to pass legislation that may allow the states to impose a use tax collection burden upon direct marketers under circumstances that Congress determines will best promote the competing interstate commerce interests at issue, so long as the legislation does not violate the Court's conception of Due Process Clause protection applicable to interstate marketers. Any decision in the context of this case to the contrary would seriously impede the efforts of the states and Congress to pursue the course which this Court has implicitly approved.

The more recent decisions of this Court in the area of personal jurisdiction, as well as with regard to taxing jurisdiction, underscore the Court's developing jurisdictional concepts concerning commercial activities that are not dependent upon the marketers' in-state physical presence. It has stated these concepts in terms of: (1) whether the commercial actor's activities are "purposefully directed toward" residents of the state, see, *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* — U.S. —, 107 S.Ct. 1026, 1033 (1987) and *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473-475 (1985); and (2) whether activities that are performed by or on behalf of the taxpayer "are significantly associated with the taxpayer's ability to establish and maintain [an in-state] market . . . for the sales." *Tyler Pipe Industries, Inc. v. Washington Department of Revenue,* — U.S. —, 107 S.Ct. 2810, 2822 (1987). Thus, in determining whether sufficient contacts

exist with a state to permit that state to impose personal jurisdiction over a party, the Court primarily focuses upon whether the party intended to enter the state in some manner. In the case of a direct marketer, the commercial actor's conduct toward the consumers of a state creates an "economic" presence, even if there is no physical presence. Holmes clearly has a substantial physical nexus in Louisiana. In addition, it has a substantial economic nexus there. Its in-state advertising, purposefully directed at Louisiana residents, is sufficient to satisfy the demands of both the Due Process and Commerce Clauses to the United States Constitution.

ARGUMENT

I. RULE 15.1 OF THE SUPREME COURT RULES SHOULD APPLY TO PRECLUDE AMICI CURIAE FROM RAISING NEW ISSUES ON APPEAL THAT WERE NOT RAISED BY THE PARTIES.

Rule 15.1 of the Rules of the Supreme Court serves to limit the questions to be decided by the Court on appeal. Rule 15.1 provides, in pertinent part, as follows:

> The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:
>
> (a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail . . . *Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.* (Emphasis supplied).

Holmes bases its appeal solely upon the Commerce Clause, Article I, Section 8, Clause 3 to the United States Constitution. (J.S. i). However, *Amici Curiae* Direct Marketing Association and American Retail Federation raise

for the first time on appeal arguments for reversal based upon the Due Process Clause of the United States Constitution, Amendment XIV, Section 1. (Brief or *Amicus Curiae* Direct Marketing Association 8 *passim;* Brief of *Amicus Curiae* American Retail Federation 8-18). At no time during the proceedings has Holmes raised the Due Process Clause as an issue to be addressed by either the parties or the lower courts. The arguments of *Amici Curiae* that the Louisiana use tax in question here violates the Due Process Clause have not been factually developed below by the parties. Therefore, such an argument should not be addressed here by the Court without the benefit of a complete record on that issue.

Amicus Curiae Direct Marketing Association would also have the Court re-affirm its decision in *National Bellas Hess* without the benefit of a fully developed record as to the true nature and full extent of the administrative burdens posed by a direct marketer's being required to collect state and local use tax. It would have the Court simply accept its assertion that "the administrative burden and expense [of collecting the use tax] would have a far-reaching effect on interstate commerce." Brief of *Amicus Curiae* Direct Marketing Association at 2. As to this issue, the Court should be permitted to view a record which includes evidence of currently available computer technology as well as evidence concerning the availability of services that address the needs of the interstate sellers with regard to sales and use tax collection and filing responsibilities.[5]

The direct marketers base their argument upon factual representations that were before the Court twenty years

[5] Computerized programs and services of various companies are now available to address, in substantial measure, the concerns of which the direct marketers complain.

ago in the *National Bellas Hess* case. Those representations were that interstate commerce would be unreasonably burdened by the imposition of a use tax collection duty upon the taxpayer in that case. *Amici* would have this Court remain unaware of the many technological advancements that have taken place over the past twenty years. They would also have the Court ignore the proliferation of service companies that provide up-to-date tax rate information support and tax return filing systems and services.

In *Irvine v. California*, 347 U.S. 128 (1954), this Court plainly expressed its disapproval of "the practice of smuggling additional questions into a case after [the granting of] certiorari. The issues . . . are fixed by the petition unless [the Court] limit[s] the grant . . .". *Id.* 129. While the "smuggling" epithet may fall a little bit harshly upon the two *Amici* here, their attempt to broaden the issues raised by the parties, if permitted by the Court, will benefit certain segments of the direct marketing industry and will disadvantage others. If the Court were to rule favorably for Holmes on either a Due Process Clause basis or on one that recognizes the continued application or extension of the *National Bellas Hess* decision, such a holding would have an impact upon litigation that is currently being developed by the states in the lower courts.[6] Additionally, were the Court to express its views on issues not

[6] For example, the case of *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania, Department of Revenue*, No. 2345 is now pending before the Pennsylvania Commonwealth Court. In that case the direct marketer, represented by the same able counsel that here represents *Amicus Curiae* American Retail Federation, has ample opportunity to raise and factually develop the Due Process and Commerce Clause issues now sought to be injected here.

raised by the parties here, it might affect the legislative process that is presently pending in Congress.[7]

Amicus Curiae Direct Marketing Association, without the benefit of a fully developed record, here argues that a direct marketer would face unreasonable burdens if it were required to collect use taxes. At the same time, the Direct Marketing Association is opposing Congressional legislation that would greatly reduce those alleged burdens.[8] The 46 sales and use tax states are supporting activities that seek either disapproval or substantial modification of the *National Bellas Hess* decision. They maintain that that decision should not be construed to prohibit the states from effectively collecting the use tax in circumstances in which the direct marketer's method of sales solicitation within the state has created an economic presence.

If the Court were to carve, on a Due Process Clause basis, catalog advertising from activities that create nexus for use tax collection purposes, would not the direct marketers then seek similar protection for other methods of sales solicitation, both on Due Process and First Amend-

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[7] *See*, H.R. 1242, H.R. 3521 and S. 1099, which would require the larger direct marketing firms to collect the use tax, so long as certain conditions were met, e.g., that the state and local rates be uniform; that the uniform rates be applied to a single state base; and that certain state and local filing requirements be reduced.

[8] *See* Hearing on S. 639 and S. 1099 before the United States Senate Finance Committee's Subcommittee on Taxation and Debt Management, held on November 6, 1987. At that hearing, Professor Lucas Powe argued that passage of those bills would result in their being held unconstitutional as violative of both of the Due Process and Commerce Clauses under the holding of *National Bellas Hess*. The states argue that such legislation would be constitutional for, among other things, the reasons discussed in this brief.

ment grounds?[9] Certainly, they would. But those questions should not be addressed in the context of this case; as they should be addressed in cases in which they have been properly raised by the parties and in which the Court has before it a fully developed record on those issues. *Amicus Curiae* American Retail Federation has underscored that the issues it here raises may impact areas that are broader than merely communicating commercial solicitations by mail. It states that:

> Senders and putative senders of interstate radio, telephone, and television communications sent by cable from one state to another my similarly be liable for use tax in each of the states in which the communication is received and through which the interstate communication passes.

Brief of *Amicus Curiae* American Retail Federation at 24.

No type of commercial speech should be exempted or protected from the analysis as to whether its use by the marketer has been sufficient to create nexus within a state for tax purposes. All types of message should be equaliy treated. The First Amendment analysis recently affirmed by this Court clearly suggests the requirement of such equality in treatment of state taxing schemes.[10]

Our nation is experiencing a shift in its economic base from manufacturing to a more service-oriented economy.

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[9] The Court's decisions in *Arkansas Writers' Project, Inc. v. Ragland*, — U.S. —, 107 S.Ct. 1722 (1987) and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) raise some concern that a decision here that immunized catalog marketers from collection of use tax would provide a basis for similar immunity for other types of solicitation, such as television, newspaper, magazine, radio, billboard and computer messages. Clearly, the Court did not intend such a result in *National Bellas Hess*.

[10] *See Minneapolis Star & Tribune Co.*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc.*, — U.S. —, 107 S.Ct. 1722 (1987), *supra*, n. 9.

Technological advancements in marketing and delivery capabilities demand new judicial analyses of modern jurisdictional issues based upon well-developed factual records. For example, one significant marketing factor that has developed as recently as the early 1970's is the use of 800 number in-WATS and out-WATS telephone services that establish a vital personal link between the direct marketers and their customers. The in-WATS telephone service provides the customer with the use of the direct marketer's telephone lines to make long-distance calls to the direct marketer without charge to the customer.[11] The factual

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[11] The rapid growth of the use of this service has been described by one author as follows:

> In 1980 alone, in-WATS and out-WATS telephone expenditures by direct marketers represented a whopping $9.845 billion, or 43% of total direct marketing media expenditures. However, each of the transactions effected through WATS contact was a personal dialog between an operator or communicator representing a company's "personality" and a valued direct marketing customer.
>
> This contact can be orchestrated in several aspects, *from the insertion of motivation buttons that will stimulate the 800 customer to respond* to a carefully written order script dialog that combines the order-taking function and customer relations practices for maximum efficiency and customer development effects.

A. Caplan, "Telemarketing-Inbound", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) at 392 (emphasis added). For a description of the powerful effect of the 800 number as a tool to "up-sell" the customer, this same author suggests:

> Whether the 800 number is combined with TV or print media, the "up-sell" concept works phenomenally well when the 800 center personnel are provided with the proper scripting and incentive to upgrade the sale. The person who is on your 800 line is your most qualified customer; he or she is in the purchase sequence and is obviously interested in your product. It is a relatively simple task to convert a book order into a deluxe edition order or a 1-year subscription into

(Continued on following page)

record in this case is not one that fairly permits resolution of the issues raised by *Amici;* and the Court should not accept *Amici's* invitation to rule on those issues. Its doing so, if it ruled in favor of the direct marketers, could have a devastating effect upon the revenues of the states and upon the businesses of competing in-state retailers.

II. THE NEXUS REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS FULLY SATISFIED WHEN SOLICITATIONS OF SALES ARE PURPOSEFULLY DIRECTED BY ANY MEANS OF COMMUNICATION TO THE RESIDENTS OF A STATE.

Amicus Curiae MTC recognizes that Supreme Court Rule 15.1 is not applied with inflexibility. *Cf., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); and that the Court is free to affirm the decision of the Louisiana Court of Appeal below "on any ground that the law and the record will permit and that will not expand the relief granted below." See, *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Therefore, the following represents a brief discussion of the extent to which the Due Process Clause should be applied to support affirmation of the ruling below.[12]

(Continued from previous page)

> a 2-year subscription. By many accounts, an up-sell can be accomplished on 25 to 30 percent of the 800 orders.

Id. at 411.

[12] This brief has been prompted solely by the attempt of the *Amici* marketers to broaden the issues; and it would not have been filed had that attempt not been made. It leaves to the good hands of the parties directly in interest the development of those Commerce Clause issues that have been properly raised. For an excellent Commerce Clause analysis with respect to the mail order industry, see McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Reevaluation*, 17 Urb. Law. 529 (1985).

Over thirty years ago, Paul Hartman, now Professor Emeritus, Vanderbilt University, suggested that new methods of marketing goods require that the Supreme Court develop new approaches regarding its concept of "nexus" in the area of interstate sales. He stated:

> With great expansion of ways of merchandising vastly different from those when the Court developed many of its ideas of due process, perhaps there should be a revamping of the notion of what constitutes sufficient "nexus" to satisfy due process, as well as what the commerce clause will permit by way of state taxation. Should not the exploitation of a state's markets for the capture of profits be enough for that state to demand something in return, thus satisfying the requisites of the due process clause? Several hundred travelling salesmen, no matter how avidly they hawk their wares, are not nearly as effective a "nexus" for an exploitation or invasion of a consumer market as a Dinah Shore or a Pat Boone as they croon their sponsor's products into the hands of thousands of purchasers on interstate television and radio. Is the state of market to be denied a tax from either the out-of-state seller or the broadcasting company because the contacts of such out-of-state sellers and broadcasters are ethereal only? Or, should a well known milk company be permitted to milk the consumer market with the sonorous singing of ballads by hillfolk and western singers without paying its tithe to the state of market on the ground that the interstate radio and television milking process is too ethereal?[13]

Professor Hartman has again, more recently, expressed this view in his treatise on the subject of state and local taxation. Professor Hartman states that:

> Benefits from the taxing State, unrelated to physical contact with the State, may be of vastly greater sig-

[13] Hartman, *State Taxation of Corporate Income From A Multistate Business*, 13 Vand. L. Rev. 21, 43 (1959).

> nificance than those derived from the presence of a whole swarm of drummers soliciting business. Practically speaking, it is hardly essential to the existence of a nexus with the taxing State that there must be personnel, directly engaged in some form of physical activity within the State in furtherance of a business purpose. *The connection between the taxing State and the out-of-state collector-seller to establish nexus should be an economic rather than a physical relationship. When the out-of-state seller takes advantage of the economic milieu within the taxing State for the purpose of realizing a profit, a sufficient nexus to require the seller to collect the use tax could be found.* (Emphasis supplied).[14]

In the *National Bellas Hess* case, the Illinois statute requiring use tax collection was not held unconstitutional on its face; but it was determined to be unconstitutional as applied to the facts of the case—two bulk mailings into Illinois, followed by the occasional mailing of flyers and the delivery by mail or common carrier of the goods purchased. The Court did not rule upon any other type or degree of interstate solicitation than that presented by the facts before it. There the Court was primarily concerned about the effect upon interstate sellers of the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *National Bellas Hess*, 386 U.S. at 759. It was those concerns that led the Court to find, on Commerce Clause grounds, that Illinois' attempt to apply its statute to National Bellas Hess violated the purpose of the Commerce Clause "to ensure a national economy free from such local entanglements." *Id.* at 760. The official syllabus of the case that

[14] P. Hartman, *Federal Limitations on State and Local Taxation*, 631 (1981). *See also*, Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993 (1986).

was prepared by the Reporter of Decisions for the Supreme Court opinions, while not controlling, clearly states that the Court's decision was based upon the Commerce Clause, no mention of the Due Process Clause; and no mention appears in the syllabus. In the *National Bellas Hess* case, the syllabus states, in pertinent part, as follows: "Held: The *Commerce Clause* prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail." *Id.* at 753 (emphasis added).[15]

The Court appears to have based its *National Bellas Hess* ruling upon the Commerce Clause, and not the Due Process Clause. However, given the discussion of the Due Process Clause in that case and *Amici's* raising it, we address those concerns here.[16]

The recent direction taken by the Court in the area of personal jurisdiction is most instructive. That direction should be viewed for guidance as to the Due Process Clause standards that are to be applied to determine whether interstate marketers may be required to collect a state's use tax.[17] *Amici Curiae* Direct Marketing Asso-

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[15] *See also* J. Hellerstein, *State Taxation* (1983) at 226, at which it is stated that the Supreme Court's *National Bellas Hess* holding was based upon Commerce Clause language.

[16] For a discussion of the inappropriateness of even relying at all upon the Due Process Clause as a basis for striking down a state tax scheme in lieu of or in addition to the Commerce Clause, *see Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 619 (1962) (Douglas, J., concurring).

[17] For a comprehensive analysis of the Court's decisions in this area and a description of its developing Due Process standards in the areas of personal and tax jurisdiction, *see* McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L.Rev. 265.

ciation and American Retail Federation choose to ignore the revolutionary manner in which business enterprises currently conduct their interstate activities. But this Court has recently considered such developments in deciding the reach of the states' personal jurisdiction. Recent cases, such as *Tyler Pipe Industries, Inc.*, 107 S.Ct. 2810 (1987); *Asahi Metal Industry Co., Ltd.*, 107 S.Ct. 1026 (1987); *Burger King Corp.*, 471 U.S. 462 (1985); and *Hustler Magazine, Inc. v. Keeton*, 465 U.S. 770 (1984), when considered along with the watershed case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), create a new set of analytical tools with which to labor in the area of nexus determinations.

This Court's decision in *Complete Auto Transit* made it clear that even direct state taxation of interstate receipts does not violate the Commerce Clause of the Constitution when such activity has a sufficient connection with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the benefits provided the taxpayer. *Id.* at 279. When viewed under this standard, the marketer that purposefully directs its commercial sales solicitations at a state's consumer base by any means may be held accountable to the extent of collecting applicable use tax. Evidence that will bear on whether the out-of-state marketer has purposefully availed itself of the state's consumer market base will often be reflected by the regularity of in-state solicitation, the systematic method by which the marketer identifies and targets its customers, the extent of credit checks and issuance of credit for sales, the methods selected for delivery or receipt of communications and delivery of goods or ser-

vices, the extent and nature of continuing contacts created with the consumers, and the like.[18]

The nexus standard proposed here is consistent with the principles adopted by the Court in both *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944), and *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). The consistency between the Court's holdings in the *General Trading Co.* and *Miller Bros.* cases with that of a nexus standard that requires a purposeful direction of commercial activities (often evidenced by regular or systematic solicitations directed at in-state residents) is evident from Justice Jackson's distinguishing in *Miller Bros.* of the

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[18] One primary goal of the direct marketer is the creation of a continuity of contact and relationship with the in-state customer. A few of the more obvious methods of creating that kind of a relationship are accomplished through the development of catalogs and other written devices that continually pour into the home; the pre-approval or easy availability of credit; free trials; and the providing of toll-free 800 WATS telephone numbers to the customer. But other, more subtle attempts are used to create an on-going relationship that will produce future sales; e.g., contractual guarantees being provided the customers; an endless variety of marketing methods involving continuity programs, such as subscriptions, automatic shipment plans, club plans and the like. As recognized by one author in the direct marketing field:

> The most successful mail-order proposition generally involves the establishment of a customer relationship which extends beyond the initial transaction. Continuity is one of the most critical, and unfortunately most neglected, aspects of the direct marketing profitability equation.
>
> A retailer can establish good customer relationships by providing the service, quality, and environment to support the simple invitation "Come again." A catalog marketer accomplishes repeat sales in the same manner, except that the marketer's image is created by the catalog and service facility.

E.L. Nash, *Direct Marketing Strategy, Planning and Execution* at 64 (1982).

Court's holding in *General Trading*. Justice Jackson, in speaking for the 5-4 majority explained as follows:

> The nearest support for Maryland's position is *General Trading Co. v. State Tax Comm'n*, 332 U.S. 335. The writer of this opinion dissented in that case and, whether or not in so doing he made a correct application of principles of jurisdiction to the particular facts, it is clear that circumstances absent here were there present to justify the Court's approval of the liability for collecting the tax. That was a case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. *The Court could properly approve the State's decision to regard such rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between the type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising.*

Miller Bros. at 346-347 (emphasis added).

The *Tyler Pipe* case held, in part, that the activities of independent contractors created nexus over the taxpayer. This is not a new proposition in the sales and use tax area. See *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). But in *Tyler Pipe*, the Court approved the following statement by the Washington Supreme Court regarding nexus: "As the Washington Supreme Court determined, 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Tyler Pipe*, 107 U.S. at 2822.

The above-quoted language sheds bright light on the Court's modern approach to nexus questions, especially in view of its rulings with respect to issues of personal jurisdiction. The Court has early on determined that the jurisdiction to tax a person is closely associated with the judicial jurisdiction of the state over that person. In the early case of *Shaffer v. Carter,* 252 U.S. 37, 49 (1920) the Court held that "[g]overnmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the State by action taken within its borders, either *in personam* or *in rem* . . . ."

Given the more recent decisions by this Court that extend personal jurisdiction Due Process Clause concepts to apply to those that "purposefully direct" their marketing efforts into a state, the issue of whether a state acquires nexus for use tax collection purposes over those out-of-state marketers is becoming ripe for review by the judiciary. The resolution of that issue, when considered in light of modern marketing techniques and the ability to respond by computer to added record-keeping requirements, should be in favor of allowing the states to extend the imposition of the use tax collection obligation to sellers who purposefully seek to exploit a state's consumer base.

In *Hustler Magazine, Inc.,* 465 U.S. 770 (1984), a libel action, this Court held that the defendant magazine publisher was subject to personal jurisdiction in a state in which its only contact was the circulation of its magazines that had been aimed at a nationwide audience. In *Burger King Corp.,* 471 U.S. 462 (1983), the Court clearly recognized that *physical* presence is not a prerequisite for personal jurisdiction. It stated that:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Id. at 476.

The Court, in *Asahi Metal Industry,* 107 S.Ct. 1026 (1987), held a foreign manufacturer not to be subject to suit in the U.S. on the facts presented; but it re-enforced its position that jurisdiction will rest upon a substantial connection being created by a defendant's action that is purposefully directed toward the forum state. What is additionally instructive about this case is found in Justice Brennan's concurring opinion, in which Justices White, Marshall and Blackmun joined. These four Justices would find personal jurisdiction consistent with Due Process notions upon a defendant's *awareness* that the stream of commerce may or will eventually deliver its product into the forum state. Justice Brennan stated:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit.

> *A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. The benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.* Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id. at 1035-1036 (emphasis supplied).

By reason of its overwhelming physical contacts with the State of Louisiana, Holmes was subject to the taxing jurisdiction of the state under traditional notions of Due Process. Additionally, even if one were to isolate the sending of its catalogs into Louisiana from its other activities, Holmes, without question, purposefully availed itself of the opportunity to solicit further business from its Louisiana customers through its use of its catalogs. The fact that its catalogs were sent into Louisiana at its direction from a point outside the state "does not permit [Holmes] to escape the burden which [Louisiana] has exacted as a price of enjoying the full benefits flowing from its aggregate [Louisiana] business." *Cf., Nelson v. Montgomery Ward*, 312 U.S. 373, 375 (1941); *see also National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 561 (1977). Finally, this Court stated in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 436 (1980) where the Court considered state corporate income tax and nexus issues in the context of a unitary business operation being conducted partly in Vermont:

> The requisite 'nexus' is . . . supplied if the corporation avails itself of the substantial privilege of carrying on business within the state . . . and . . . [t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1959).

Id. at 436-7.

Holmes' attempt to divorce its delivery of catalogs to its Louisiana customers from the rest of its retail operation is without foundation in law or fact. Here, Holmes' delivery of catalogs was intended for the promotion of its Louisiana retail business. The fact that the catalogs were printed outside Louisiana should have no bearing on the nexus that was created by their delivery and use inside Louisiana or the nexus that had already been established by virtue of Holmes' being domiciled there.

CONCLUSION

The great changes that have taken place over the past several decades with respect to our country's economic base and the channels of distributing goods and services from point of manufacture to point of sale require us to move from traditional ways of approaching many state tax issues. Given modern methods of selling and delivering goods and services, many businesses find it more advantageous to deal through the mails or other means of communication than to maintain a physical presence within a state. Face-to-face selling is expensive; and, therefore, to the extent that there are less expensive marketing alternatives, that method is fading from the retail business scene. The direct marketing approach succeeds,

in part, because it is at a distance from the buyer and is not dependent upon the overhead required to operate in the retail store setting, i.e., a sales force, inventory, store, fixtures, and warehouse. The direct marketing industry is experiencing tremendous growth, in large measure, at the expense of the in-state store-bound retailer. The economic disadvantages bear heavily upon the in-state retailer. A tax differential of 5% or so can be a business killer for the "Main Street" retailer and, correspondingly, a reason for celebration by the out-of-state marketer.

The basic Due Process Clause notions of fairness and fair warning are satisfied when the out-of-state seller purposefully directs its activities toward a state for the purpose of marketing its goods and services there. The current development of Due Process standards for personal jurisdiction is analogous to that for taxing jurisdiction. The reasoning found in cases such as *Tyler Pipe*, 107 S.Ct. 2810 (1987), *Asahi Metal Industry*, 107 U.S. 1026 (1987), *Burger King Corp.*, 471 U.S. 462 (1985), and *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) should be applied here in the Court's crafting of Due Process Clause standards with regard to the nexus required for use tax collection purposes.

The proper balancing of the interests of the out-of-state marketer, the state and its residents will best be accomplished by affirming the judgment below; and by doing so on grounds that permit the state to effectively impose a use tax collection duty upon all who purposefully avail themselves, by any means of communication, of the benefits of the state's market. To the extent that this proper balance can only be achieved through disapproval or modification of the decision in *National Bellas Hess*, *Amicus*

Curiae Multistate Tax Commission urges this Court to do so either here or in a case in which the record is more fully developed as to that issue.

The judgment below should therefore be affirmed on the basis that Louisiana's imposing of use tax on the catalogs here in question complies fully with Due Process and Commerce Clause requirements.

Respectfully submitted,

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February 5, 1988

Supreme Court, U.S.
FILED
FEB 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D. H. HOLMES CO., LTD.,
Appellant,

v.

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee.

On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the Commerce Clause protects a retailer doing business within a State from a use tax on the distribution of catalogs mailed to its customers within the State when the catalogs are produced outside the State.

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IN THE

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D. H. HOLMES CO., LTD.,
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Appellee.

**On Appeal from the Court of Appeal,
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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling

interest in legal issues that affect state and local governments. In this case, a Louisiana retailer would avoid a routine state use tax by having its promotional catalogs designed and printed outside the State for delivery directly to its customers in Louisiana. The retailer concedes that it would owe Louisiana tax if the catalogs were printed in the State. J.A. 97. Thus, a Louisiana corporation asserts that its use of out-of-state suppliers insulates it from a tax that is a normal incident of the conduct of its business within Louisiana.

Amici are concerned about this case because it involves an egregious use of the Commerce Clause as a sword rather than a shield. The dormant Commerce Clause prohibits discrimination against interstate commerce, but it does not require the States to discriminate in favor of interstate commerce. Here, a local business' use of the Commerce Clause to avoid a state tax would give that business a competitive advantage over other taxpayers.

Use of the dormant Commerce Clause as a sword to cut from the States their powers to collect uniform, nondiscriminatory taxes is incompatible with our federal system of government. The States' power to raise revenue by imposing taxes is a fundamental aspect of their sovereignty. State taxing authority is subject to constitutional limitations, but this Court's decisions have repeatedly recognized that States can require businesses engaged in interstate commerce to pay their fair share of the costs of government. Without that power, the States would be effectively deprived of independent existence and ability to govern.

Amici submit that the Louisiana Court of Appeal correctly applied this Court's precedents concerning the legitimate scope of state taxation under the dormant Commerce Clause. Because the Court's decision in this case will directly affect matters of prime importance to

amici and their members, *amici* submit this brief to assist the Court in its consideration of the case.[1]

STATEMENT OF THE CASE

Appellant D. H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation with its principal place of business in New Orleans, Louisiana. Holmes operates thirteen department stores in Louisiana, as well as stores in Mississippi and Alabama. Holmes has approximately 5,000 employees and 1,500,000 to 2,000,000 customers within Louisiana. J.S. App. 9A.

In 1979, 1980, and 1981, Holmes contracted with New York companies for catalogs to promote Holmes' merchandise. The contractors designed and prepared the catalogs under Holmes' direction. They were not mail-order catalogs, but promotional pieces intended to bring customers to Holmes' retail stores. The catalogs were printed in Boston, Oklahoma City, and Atlanta and mailed directly to residents of Louisiana, Mississippi, and Alabama selected by Holmes. The catalogs carried instructions for postal carriers to leave them with the current resident if the addressee had moved and to return nondeliverable catalogs to one of Holmes' New Orleans stores. Approximately 82 percent of the catalogs were distributed to Louisiana residents. Holmes paid no taxes on the catalogs in the States where they were prepared and printed. J.S. App. 3A-4A.

Louisiana imposes a compensatory use tax of 3 percent on "the use, the consumption, the distribution, and the storage for use or consumption in this state" of "each item or article of tangible personal property" not subjected to a sales tax at that rate in Louisiana or elsewhere when acquired. La. Rev. Stat. §§ 47:302(A)(2),

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters have been filed with the Clerk of the Court.

47:321(A)(2). Upon audit of Holmes' sales and use tax returns for 1979-1981, the Louisiana Department of Revenue and Taxation assessed Holmes for delinquent use taxes on the cost price of the catalogs that it had distributed to Louisiana residents. Holmes challenged the tax on the ground that it violated the Commerce Clause of the United States Constitution. J.S. App. 2A-13A.

The Louisiana courts sustained the State's tax. The trial court found that the distribution of the catalogs within Louisiana was "intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana" and that the distribution was a taxable "use" of the catalogs. The trial court concluded that application of the use tax to Holmes' activity did not unconstitutionally burden interstate commerce because the tax satisfied the four-factor test stated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). J.S. App. 21A-22A. The Louisiana Court of Appeal, Fourth Circuit, affirmed the trial court's ruling. *McNamara v. D. H. Holmes Co.*, 505 So.2d 102, 105-106 (1987) (J.S. App. 2A-10A). It agreed that "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." J.S. App. 7A. It also agreed that Holmes' Commerce Clause challenge should fail because the tax passed the test stated in *Complete Auto*. The Supreme Court of Louisiana denied Holmes' petition for review. 506 So.2d 1224 (1987) (J.S. App. 11A).

SUMMARY OF ARGUMENT

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), established that a state tax on interstate commerce is constitutional if it (i) is applied to activity having a substantial nexus with the State, (ii) does not discriminate against interstate commerce, (iii) is fairly apportioned, and (iv) is fairly related to benefits that the State provides. *Id.* at 287; *Department of Revenue*

v. Association of Washington Stevedoring Cos., 435 U.S. 734, 750 (1978). The Court consistently has used this test to determine whether a state tax impermissibly burdens interstate commerce. The *Complete Auto* test is the appropriate standard for determining whether the Louisiana use tax on the distribution of catalogs violates the Commerce Clause.

The stated object of Louisiana's use tax is "the use, the consumption, [or] the distribution" of tangible personal property in Louisiana. La. Rev. Stat. § 47:302(A). The Louisiana courts found that appellant's distribution of catalogs to Louisiana residents constituted a "use" under the statute. The use tax is a tax on the privilege of use; it is not a direct tax on goods. *See McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Thus, like the tax at issue in *Complete Auto*, the tax at issue here has been imposed on the in-state portion of an activity in interstate commerce.

The *Complete Auto* test would govern even if the tax fell directly on goods in transit. This Court's antique jurisprudence prohibiting direct taxes on goods in interstate commerce is premised on the prohibition of all direct taxes on interstate commerce. That premise was repudiated in *Complete Auto*, 430 U.S. at 288. Where a state tax satisfies each element of the *Complete Auto* test with respect to property in transit, the State has a sufficient constitutional basis for taxing the property. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979).

Louisiana has satisfied the nexus requirement of the *Complete Auto* test because the activity that it taxed took place within the State and bore a substantial relationship to Holmes' business within the State. Holmes caused the distribution of the catalogs within Louisiana by ordering the catalogs and directing their delivery to Louisiana customers through the United States mail.

The catalogs were an integral p[illegible]of Holmes' in-state business because they were intended to promote in-state sales. Thus, the distribution activity has a direct nexus with Louisiana.

Louisiana also has satisfied the other three parts of the *Complete Auto* test. The Louisiana use tax compensates the State for the use within the State of property purchased outside the State free from Louisiana sales tax. Like the compensatory use taxes in other States, the Louisiana tax does not discriminate against interstate commerce because the burden placed on goods purchased out-of-state is identical to that placed on equivalent purchases within the State. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The tax is fairly apportioned because it falls only on in-state activity and because it provides a credit for sales taxes paid to other States. The tax is fairly related to the services provided by the State because Holmes' extensive in-state business enjoys the full benefit of Louisiana's governmental services. Since Louisiana's tax satisfies the four-factor *Complete Auto* test, it does not impose an undue burden on interstate commerce.

Appellant should not be allowed to use the Commerce Clause as a sword to defeat a tax on a normal incident of its in-state business. Although no State may discriminate against interstate commerce, "the Commerce Clause does not require that interstate commerce be placed in a privileged position." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 649 (1981) (Blackmun, J., concurring). A compensatory use tax is designed to promote equality between in-state and out-of-state purchases. The use tax prevents the drain on state revenues that would occur if local businesses could escape the tax on local sales by placing orders outside the State. The tax also prevents the discrimination against in-state sellers that would result from such practices. *See National Geographic Society v. California Board of Equalization*, 430

U.S. 551, 555 (1977). If the Court upheld Holmes' position, taxpayers would be encouraged to channel their purchases through interstate commerce in order to avoid taxes. Such a result would deprive the States of their power to require that businesses pay their fair share of the costs of government.

ARGUMENT

I. *COMPLETE AUTO* PROVIDES THE PROPER TEST FOR DETERMINING WHETHER LOUISIANA'S APPLICATION OF ITS USE TAX VIOLATES THE COMMERCE CLAUSE

Appellant's challenge to the imposition of Louisiana's use tax on its in-state distribution of its promotional catalogs has an archaic flavor. Appellant concedes that it would have been subject to the State's sales tax if it had purchased the catalogs in Louisiana (J.A. 97), but it insists that the State's compensating use tax is not due when it purchases the catalogs outside the State for direct delivery to the intended recipients. Appellant seeks to disassociate itself from the in-state use of the catalogs because it does not take direct possession of them and because they come into the State through the United States mail. This argument is reminiscent of the formalism that governed constitutional challenges to state taxes before it was repudiated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Complete Auto upheld a State's tax on the distribution of goods in interstate commerce. 430 U.S. at 276-277. The case involved a sales tax on the shipment of new cars from railroad yards to the dealerships that had ordered them. Rejecting the antique notion that a state tax on interstate commerce necessarily violates the Commerce Clause, *Complete Auto* held that state taxes affecting commerce are constitutional as long as they (i) are applied to activity having a substantial nexus with the State, (ii) do not discriminate against interstate com-

merce, (iii) are fairly apportioned, and (iv) are fairly related to the benefits that the State provides. *Id.* at 287.

A long line of cases decided since *Complete Auto* has recognized that the four factors identified in *Complete Auto* constitute the proper test for determining whether a state tax on in-state commercial activities violates the Commerce Clause's prohibition on the States' interference with the free flow of interstate trade. *See, e.g., American Trucking Ass'ns v. Scheiner*, 107 S.Ct. 2829 (1987); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). In that line are cases involving various state taxes on the in-state portion of interstate commerce, such as a business tax on the in-state handling of goods in transit (*Washington Stevedoring*), a property tax on cargo containers moving in foreign commerce (*Japan Line*), and a highway tax on intrastate travel over interstate arteries (*American Trucking*). Both *Complete Auto* and its progeny therefore have established *Complete Auto*'s test as the proper measure of a State's power to levy taxes affecting interstate commerce.

Like *Complete Auto*, this case involves a state tax on the in-state distribution of goods in interstate commerce. The stated object of the Louisiana use tax is "the use, the consumption, [or] the distribution" of tangible personal property in Louisiana. La. Rev. Stat. § 47:302(A). The State has applied that tax to appellant's distribution of catalogs through the mail to Louisiana residents who were customers or potential customers of its Louisiana retail stores. J.S. App. 3A-7A. Thus, Louisiana has taxed the in-state portion of an activity strikingly similar to the activity in *Complete Auto*.

Holmes contends that *Complete Auto* should not apply to this case because Louisiana's use tax is a direct tax on the catalogs while they still were moving in interstate commerce. Holmes is mistaken on two counts.

First, Louisiana has not taxed Holmes' catalogs. Use taxes are not direct taxes on goods, even though the amount of a use tax depends upon the value of the goods that the taxpayer has used. Use taxes are simply taxes on the privilege of using goods without paying sales tax on them. Like all use taxes, Louisiana's tax falls on an activity: the use of property that Holmes acquired without paying a sales tax to any State. La. Rev. Stat. § 47:302(A)(2); *see McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In this case, Louisiana has found that Holmes made use of the catalogs when it distributed them to Louisiana residents in order to promote its Louisiana business. J.S. App. 3A-7A. Even if the catalogs still were moving in interstate commerce when that use occurred, as Holmes argues, Louisiana's tax remains a tax on the distribution of the catalogs rather than a tax on the catalogs themselves. Thus, the Commerce Clause standard used in *Complete Auto* and its progeny to evaluate state taxes on activities in interstate commerce is the proper standard for evaluating a use tax on the distribution of goods that have moved through interstate commerce.

Second, the *Complete Auto* test would govern this case even if Louisiana had taxed Holmes' catalogs while they were in transit. The notion that the Commerce Clause flatly prohibits all direct taxes on goods in commerce is a relic of categorical thinking long ago rejected. Antique authority flatly prohibiting direct state taxation of goods in transit rested on the premise that any state taxes on interstate commerce violate the Commerce Clause. *See Minnesota v. Blasius*, 290 U.S. 1, 9 (1933); *Coe v. Town of Errol*, 116 U.S. 517, 523 (1886). That premise was repudiated resoundingly in *Complete Auto*. 430 U.S. at

279; *see Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 115-116 (1975) (Blackmun, J., concurring). Since then, this Court necessarily has questioned the vitality of the flat prohibition found in the old cases. *See Washington Stevedoring*, 435 U.S. at 745-746 (authority prohibiting taxes on stevedoring reexamined in light of *Complete Auto*); *see also American Trucking Ass'ns*, 107 S. Ct. at 2848 (authority upholding facially neutral flat taxes reexamined in light of *Complete Auto*). The constitutionality of state taxes on goods in transit should be examined in light of the test articulated in *Complete Auto*. *See Japan Line*, 441 U.S. at 445 (containers moving in commerce subject to direct state taxes under standards embodying the *Complete Auto* test); P. Hartman, Federal Limitations on State and Local Taxation § 2.18 (1981); 1 J. Hellerstein, State Taxation: Corporate Income and Franchise Taxes § 4.11 (1983).

II. LOUISIANA'S APPLICATION OF ITS USE TAX SATISFIES THE FOUR PARTS OF THE *COMPLETE AUTO* TEST

A. Appellant's Distribution Of Its Catalogs Has A Substantial Nexus With Louisiana

Louisiana has satisfied the nexus requirement of the *Complete Auto* test because the activity that it taxed took place within Louisiana and bore a substantial relationship to Holmes' business within the State. Louisiana has taxed the distribution to Louisiana residents of catalogs inviting them to shop at Holmes' Louisiana retail stores.

Holmes' catalog distribution took place within Louisiana. The delivery of the catalogs to customers and potential customers residing in Louisiana was the purpose and final step of the activity. Holmes caused the distribution by ordering the catalogs and directing their delivery through the mail. Holmes used the catalogs within Louisiana to promote its business in the State by directing their delivery to specified customers within the State, by directing alternative delivery to current residents at addresses within the State, and by directing all non-deliverable catalogs to one of Holmes' New Orleans stores. J.S. App. 4A. Thus, Holmes enjoyed the benefit of using the catalogs for their intended purpose when they came to rest in the hands of persons throughout Louisiana.

Not only did Holmes' catalog distribution take place within Louisiana, it also directly related to Holmes' Louisiana business. Holmes' catalogs were not mail-order catalogs soliciting interstate business, but promotional catalogs inviting customers to buy at Holmes' Louisiana retail stores. Thus, the catalog distribution that Louisiana has taxed was an integral part of what Holmes concedes to be its substantial business inside Louisiana. Louisiana has a strong nexus with Holmes' distribution of its catalogs because Holmes made use of the catalogs in the course of conducting its active business within the State.

Holmes' substantial business presence within Louisiana distinguishes this case from *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). *Bellas Hess* held that the Commerce Clause prohibits a State from imposing the duty to collect use taxes on mail-order sellers whose only contacts with the State are communications by mail or common carrier. *Id.* at 758. *Bellas Hess* has no application to a case where the mail-order seller keeps "retail outlets, solicitors, or property" within the taxing state. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 559 (1977). *Bellas Hess* therefore is not relevant to a case like this one, where the taxpayer is an in-state retailer and the activity subject to tax is an integral part of the taxpayer's in-state business. *Id.* at 561.

Holmes incorrectly imagines that a decision for Louisiana in this case would allow a State to levy use taxes on all catalogs and promotional materials mailed to its residents. Holmes sees that spectre because it completely fails to acknowledge both Louisiana's nexus with the catalog distribution and the ample protection against burden-

some state taxation afforded by a proper application of the *Complete Auto* test. A decision for the State in this case simply would recognize that a retailer doing substantial business within a State cannot withdraw certain otherwise taxable aspects of that business from the State's taxing jurisdiction by covering them with the cocoon of interstate commerce. *See Complete Auto, supra; Washington Stevedoring, supra.* Out-of-state merchants with minimal connections to a State would continue to find shelter from invalid state exactions through the nexus, apportionment, fair relationship, and antidiscrimination requirements of the *Complete Auto* test.

B. Louisiana's Compensatory Use Tax Does Not Discriminate Against Interstate Commerce

The Louisiana use tax compensates the State for the use within the State of property purchased outside the State free from Louisiana sales tax. See La. Rev. Stat. §§ 47:302(A); 47:305(E). Like compensatory use taxes in other States, the Louisiana tax is designed to promote equality between in-state and out-of-state purchases. The tax protects state sales tax revenues and prevents discrimination against in-state sellers by ensuring that property bought at retail outside the State bears the same tax as property bought at retail inside the State. *See National Geographic*, 430 U.S. at 555; *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581-84 (1937).

The Louisiana use tax does not discriminate against property purchased out-of-state for distribution and use within the State. The tax applies only to the use of goods acquired free of sales tax at the rate that would have applied had the goods been acquired in Louisiana. La. Rev. Stat. § 47:303(A) (credit for sales tax paid). Out-of-state goods bear no greater burden than in-state goods. One is taxed in connection with "one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Silas Mason*, 300 U.S. at 584. Thus, like the compensatory use taxes that this Court

repeatedly has approved, the Louisiana tax does not discriminate against interstate commerce. *See National Geographic, supra; see also Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 107 S.Ct. 2810, 2818-2820 (1987) (general discussion of compensatory taxes).[2]

C. Louisiana's Use Tax Is Fairly Apportioned

The compensatory nature of the Louisiana use tax assures that the tax is fairly apportioned. The Louisiana use tax statutes give credit against the tax for any sales or use taxes paid to another State. La. Rev. Stat. § 47:303(A). The statutes also limit the tax to the use of goods that have come to rest within the State. La. Rev. Stat. § 47:305(E). Use of goods that have come to rest is a wholly intrastate activity, and a tax on it therefore does not require apportionment. *See Tyler Pipe*, 107 S.Ct. at 2822 (wholesaling is a local activity); *Commonwealth Edison*, 453 U.S. at 617 (severance tax is a tax on local activity that does not require apportionment).

D. Louisiana's Use Tax Is Fairly Related To The Services That The State Affords Appellant

The catalog distribution subjected to tax is an integral part of Holmes' Louisiana retail business. That

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[2] Imposition of the use tax on a "cost price" including design services that would not be subject to sales tax if separately purchased in Louisiana does not discriminate against out-of-state purchases. *Cf. Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963) (use tax invalid where imposed on overhead costs of self-constructed property produced outside the State). Louisiana has not attempted to tax design work brought into the State in circumstances where the in-state purchase of design services would not have been taxable. Here, Holmes has purchased finished catalogs and brought them into the State. Louisiana properly imposed its use tax on the cost of the catalogs because the in-state purchase of finished catalogs would have been taxable. See W. Hellerstein, *Commerce Clause Restraints on State Taxation: Purposeful Economic Protectionism and Beyond*, 85 Mich. L. Rev. 758, 767 (1987).

business enjoys the full benefit of Louisiana's governmental services and public infrastructure. By imposing a use tax, Louisiana simply asks that business to pay one of the normal taxes routinely assessed against local businesses throughout the United States. *See National Geographic*, 430 U.S. at 555. The tax therefore bears a fair relationship to Holmes' presence and activities within the State. *Commonwealth Edison*, 453 U.S. at 629.

III. APPELLANT CANNOT USE THE COMMERCE CLAUSE AS A SWORD TO DEFEAT A ROUTINE TAX ON A NORMAL INCIDENT OF ITS IN-STATE BUSINESS

"The Commerce Clause does not state a prohibition; it merely grants specific power to Congress." *Washington Stevedoring*, 435 U.S. at 749. Over the years, however, the Commerce Clause has been understood to afford a shield that protects interstate commerce from undue state interference. The fundamental principle of jurisprudence under the dormant Commerce Clause is that no State may discriminate against interstate commerce. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977). On the other hand, "the Commerce Clause does not require that interstate commerce be placed in a privileged position." *Commonwealth Edison*, 453 U.S. at 649 (Blackmun, J., concurring). Activities in interstate commerce must bear a fair share of the fiscal and other burdens associated with the support of state and local governments. *Id.* at 625-626; *see Complete Auto*, 430 U.S. at 288; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). The Commerce Clause is not a sword with which businesses can exact concessions from the States.

In this case, Holmes would wield the Commerce Clause as a sword to withhold from Louisiana a routine tax on a normal incident of Holmes' in-state business. A compensatory use tax is designed to promote equality between in-state and out-of-state purchases. The use tax prevents the drain on state revenues that would occur if buyers could escape the tax on local sales by placing orders outside the State. The tax also "put[s] local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from sales tax." *National Geographic*, 430 U.S. at 555. Rather than pay the routine tax on its use of property purchased out-of-state, however, Holmes claims that contact with interstate commerce immunizes the distribution of its catalogs from the otherwise applicable tax. If Holmes should prevail, Louisiana would be denied the normal revenues related to Holmes' in-state activities. Louisiana printers would be placed at a competitive disadvantage to printers in other States, and other Louisiana retailers who use in-state printers would be disadvantaged in comparison to Holmes. By using the Commerce Clause as a sword, Holmes would have advantaged interstate commerce at the expense of local business.

In return for accepting the benefits of doing an extensive business within Louisiana, Holmes must submit to the State's application of its tax statutes as long as the State keeps within constitutional bounds. *Norton Co. v. Department of Revenue*, 340 U.S. 534, 538 (1951). Louisiana has found that Holmes' distribution to Louisiana residents of promotional catalogs printed in and mailed from another State is a taxable use of property within the State. Holmes' contention that it cannot be taxed because it did not own the catalogs when they came to rest within the State merely quarrels with Louisiana's interpretation of its own statute. Louisiana's tax satisfies the constitutional requirements of the Commerce Clause as set forth in *Complete Auto*. Holmes cannot avoid the tax by arguing that the catalog distribution is immune simply because the catalogs moved across state lines. Louisiana has not burdened Holmes'

use of interstate commerce; the Commerce Clause demands no more.

CONCLUSION

The judgment of the Louisiana Court of Appeal, Fourth Circuit, should be affirmed.

Respectfully submitted,

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February 8, 1988